11978

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1896.

No. ~~825~~ 179.

THE LOUISVILLE WATER COMPANY, PLAINTIFF IN ERROR,

vs.

THE COMMONWEALTH OF KENTUCKY.

IN ERROR TO THE COURT OF APPEALS OF THE STATE OF KENTUCKY.

FILED MAY 16, 1896.

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(16,301.)

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1 *Pleas.*

COMMONWEALTH OF KENTUCKY:

Pleas before the honorable the court of appeals of Kentucky, held at the capitol, in the city of Frankfort, on the 27th day of March A. D. 1896, Judges Joseph H. Lewis, J. H. Hazelrigg, B. L. D. Guffy, and George Du Relle sitting.

Caption.

LOUISVILLE WATER COMPANY, Appellant,
vs.
THE COMMONWEALTH OF KENTUCKY, Appellee.

Be it remembered that heretofore, to wit, on the 11th day of August, A. D. 1893, the appellant, by counsel, filed in the office of the clerk of the Kentucky court of appeals a transcript of record, in words and figures following, to wit:

COMMONWEALTH OF KENTUCKY:

Louisville Law & Equity Court.

COMMONWEALTH OF KENTUCKY & H. A. BELL, Sheriff of Jefferson County, Plaintiff-,
vs.
LOUISVILLE WATER COMPANY, Defendant.

Pleas before the honorable judge of Louisville law & equity court, at the court-house, in Louisville, Jefferson county, Kentucky, on the dates hereinafter mentioned.

Be it known that heretofore, to wit, on January 9, 1891, came plaintiff-, by Helm & Bruce, attorneys, and filed in the office of the clerk of the court aforesaid *its* petition. Said petition is in words and figures following, to wit:

The plaintiffs say that H. A. Bell is and was at the time hereinafter mentioned the duly elected and qualified sheriff of Jefferson county, Kentucky.

The defendant, The Louisville Water Company, is a corporation duly chartered by and organized under the laws of this State, with full power to sue and be sued, to contract and be contracted
2 with, with all the rights specially given by its charter. The plaintiff- say that the defendant is now and was at the time hereinafter stated the owner in fee and possessed of the following property in the city of Louisville and county of Jefferson, to wit, 88.56 acres of land in Edwards' Pond and Gillman's magisterial district of Jefferson county, Ky., near the land of Callahan; also 28.52 acres of land near the lands of F. Wall, Sr.; also 1.28 acres of land near Callahan's tract; also 100 acres and ten acres and 2.49

acres in the Crescent Hill Reservoir tract; also a tract of land purchased of H. A. Myer near the Callahan tract; also two certain lots of land in Jefferson county, the one lying on the east side of Third street between Green and Walnut streets, having a front of Third street of 52½ feet by a depth of 234 feet, the other fronting the west side of an alley between Second and Third and Green and Walnut streets, having a front on said alley of twenty feet by a depth of 120 feet and being lots 12 and 10 of block 41 on city maps on file in the assessor's office of the city of Louisville; also all the pipes and mains running to and from said city and under the streets and alleys of said city; also all the buildings, reservoirs, engines, pumping stations, &c., belonging to the Louisville Water Company.

Said property was for the year 1886 subject to assessment and taxation for State purposes, but notwithstanding it was the duty of the defendant to list said property for State taxation for said year it wholly failed to list the same or any part thereof with the assessor of Jefferson county or with the auditor of public accounts, and the said assessor and said auditor severally omitted to assess said property or any part thereof for said years of any of them.

Plaintiffs say that on the — day of January, 1891, he, as the then acting sheriff aforesaid, in writing reported to George
3 H. Webb, the then clerk of said county court, the fact that the said assessor and said auditor had both omitted to assess said property and reported the same to the county court clerk for assessment. A copy of said report is filed herewith as part hereof, marked "A."

The rate of tax for said year was 51½ cents on the one hundred dollars; the total tax due by the defendant to the Commonwealth on all its property for the year aforesaid in the sum of $12,875, no part of which has been paid.

The said George H. Webb, clerk of the county court aforesaid, entered said assessment on the assessor's book for Jefferson county and certified the same to the auditor of public accounts, and also certified the same to this plaintiff for collection, and said written report of this plaintiff, together with the certificate of said Webb, clerk aforesaid, is filed herewith as part hereof, marked "B."

Plaintiff afterwards, to wit, on the — day of January, 1890, demanded of the defendant said tax, but the said defendant refused to pay the same or any part thereof and persisted in said refusal.

The plaintiffs say that the tax herein mentioned cannot be collected by the ordinary method of distraint and sale, and plaintiff further says that the defendant, The Commonwealth of Kentucky, has a lien on said property by virtue of the statute laws of Kentucky to secure said taxes, and this suit is now brought for the enforcement of that lien and to coerce the payment of said taxes.

Wherefore plaintiffs pray that the defendant be required
4 to answer and show cause, if any it has or can, why it should not be compelled to pay said taxes into this court by a day to be named by the court, or, failing to make said payment at the day named, why the property of the corporation should not be placed in the hands of a receiver of this court to be held, managed,

and controlled by the said receiver until the taxes aforesaid can be paid from the receipts of the defendant, and plaintiffs pray for costs and for all general and equitable relief.

HELM & BRUCE,
Att'ys for Plaintiffs.

And thereupon the clerk issued summons and copy directed to the marshall of the Louisville chancery court; said summons is in words and figures following, to wit:

Louisville Law & Equity Court.

The Commonwealth of Kentucky to the marshal of the Louisville chancery court, Greeting:

We command you to summon Louisville Water Company to answer a petition exhibited against it in our Louisville law & equity court by Commonwealth of Kentucky and H. A. Bell, sheriff of Jefferson county, No. 4186, and warn it that upon failure so to do for twenty days after service hereof, if in Jefferson county, or for thirty days if elsewhere in the State, judgment may be rendered by default or answer compelled or proof taken at petitioner's option, and make due return hereof within sixty days from the date hereof.

Witness John H. Weller, clerk of the Louisville chancery court and *ex officio* clerk Louisville law and equity court, at the courthouse in Louisville, this 9th day of January, 1891.

JOHN H. WELLER, *Clerk*,
By J. G. WALKER, *D. C.*

And the marshal returned said summons with the following endorsement thereon:

Came to hand Jan. 10th, 1891, at 8.30 a. m. Executed on the Louisville Water Co. Jan. 12th, 1891, by delivering a copy of the within summons to Charles R. Long, president thereof.

W. E. MONTZ,
M. L. C. C.,
By C. K. OSBORNE, *D. M.*

Came on the 13th day of August, 1891, *came* the defendant, by counsel, and filed its answer in the office of the clerk of the court aforesaid.

Said answer is in words and figures following, to wit:

Louisville Law and Equity Court.

COMMONWEALTH OF KENTUCKY, &c., Plaintiffs,
vs.
THE LOUISVILLE WATER COMPANY, Defendant. } 4186.

The defendant, The Louisville Water Company, for answer herein, denies that the property described in the petition or any part of the

property described in the petition was in the year 1886 or
6 any year or from since the 22nd day of April, 1882, subject to taxation or subject to assessment for taxation or subject to assessment for the said purposes or for any purpose; and it denies that it was its duty to list said property or any part of said property for said taxation or for any taxation or for the year 1886 or for any year since the 22nd day of April, 1882; and they deny the right, power, or authority of the auditor of public accounts or of the assessor of the city of Louisville or of the sheriff of Jefferson county to assess or to have assessed said property or any part of it for the purpose of said taxation or for any purpose for the said year 1886 or for any year subsequent to the 22nd day of April, 1882; and it denies that on the — day of April, 1891, or at any time prior to the commencement of this action or on the 9th day of January, 1891, the plaintiffs or either of the plaintiffs, in writing or otherwise or at all, reported to Geo. H. Webb, the then clerk of the said county court of Jefferson county, the alleged fact that the said assessor and the said auditor or either the said assessor or said auditor had omitted to assess the said property or any part of it or reported to the said county clerk for assessment or for taxation of said property or any part thereof; and defendant denies that a copy of the alleged report is or ever has been filed or made a part of the petition or marked "A;" and defendant denies that the total tax or any tax due by it to the plaintiff The Commonwealth of Kentucky on all or any part of this said property for the year 1886 or for any year is the sum of $12,875.00 or any part thereof or any sum.
7 They deny that prior to the commencement of this action or on the 9th day of January, 1891, the said Geo. H. Webb, clerk of the county court aforesaid, entered said alleged assessment on the assessor's book of Jefferson county or certified the same to the auditor of public accounts, or certified the same to the plaintiff or either of them for collection or at all, and it denies that the said alleged written report of the plaintiffs or either of them, together with or without the certificate of the said Webb, the clerk as aforesaid, is now or ever has been filed with the petition or as a part thereof or marked "B."

And this defendant denies that upon the — day of January, 1890, or at any time prior to the commencement of this action or at all, that plaintiffs or either of them demanded of this defendant said alleged taxes, or that this defendant refused to pay the same thereof or persisted in said refusal.

This defendant denies that plaintiff The Commonwealth of Kentucky has a lien or ever had a lien on the property described in the petition or any part of it, by virtue of the statute law of Kentucky or at all, to secure such alleged tax or any part thereof.

This defendant denies that the said alleged taxes were ever assessed or levied or demanded in the way alleged in the petition or in any manner whatever.

Paragraph 2. This defendant says that it is a body corpo-
8 rate; that it was created and organized under and in pursuance of an act of the General Assembly of the Common-

wealth of Kentucky approved March 6th, 1854, entitled "An act to incorporate the Louisville Water Company, and various other acts of the General Assembly supplementary thereto and amendatory thereof."

This defendant says that by said charter it was invested with the right, power, and authority to construct, establish, and maintain within or near the city of Louisville reservoirs, engine-houses, pumps, pumping machines, machinery, and engines necessary to constitute a completely equipped water works; to construct and maintain under and on the public ways of the Commonwealth water pipes and mains connecting all parts of the city of Louisville with its reservoirs; to construct and maintain water pipes and mains connecting the reservoir, or writ of *ad quod damnum* — take and hold in fee-simple or for a less estate any and all lands necessary for the convenience management of the concerns of this defendant, to the end that this defendant might at all times be able to furnish and might furnish an abundant supply of pure, fresh, and wholesome water to the inhabitants of the city of Louisville, *that* and to the end that this defendant might be able to and might furnish and supply an abundance of water to flush and cleanse the public ways in the city of Louisville, and to the end that this defendant might be able to and might furnish and supply an abundance of water to the public fire-cisterns and public plugs and hydrants in the city of Louisville as a protection against the loss or destruction by fire of public and private property in the city of Louisville.

9 This defendant says that in pursuance of the provisions *provisions* of its charter and in the exercise of the rights and powers therein conferred upon it, and as indispensable and necessary for the convenient management of its concerns and to carry out and to effectuate the purposes of its incorporation, it did long prior to the first day of January, 1880, acquire in fee-simple and has since held and owned and now holds and owns the property described in the petition.

The defendant says that in the acquisition of the property and all of it described in the petition and in the construction and management of the said reservoirs, coal-houses, stand-pipes, towers, engine-house, chimneys, pump station, pipe, and pipeways and other improvements, all of which are now and have continuously been prior and since January 1st, 1880, necessary and indispensable to the efficient management of its concerns and to the purpose and objects of its incorporation, it has laid out and expended over $2,500,000.00.

This defendant says that it did on and before the 1st day of January, 1880, that it has continuously since said date, and defendant now furnishes an abundant supply *now* pure, fresh, and wholesome water to the inhabitants of the city of Louisville; that it did on and before the 1st day of January, 1880, and has continuously since, and defendant now — supply an abundance of water to flush and cleanse the public ways of the Commonwealth in the city of Louisville; that it did on and before the 1st day of January, 1880, and

has continuously since the said date, and defendant now fur-
10 nishes an abundant supply of water to the public fire-cisterns and public fire plugs and hydrants in the city of Louisville as a protection against loss and destruction by fire of the public and private property in the city of Louisville.

The defendant says that to the end that the property of the Commonwealth located in the city of Louisville and aggregating many millions of dollars in value, and that the property of the citizens of this Commonwealth, so far as located in the city of Louisville and of a value exceeding $100,000,000, might be protected from loss or destruction by fire, it was enacted and provided by the General Assembly of the Commonwealth of Kentucky, in and by an act approved upon the 3rd day of March, 1870, entitled "An act to establish a new charter for the city of Louisville," that the said city of Louisville should, in and by an exercise of the power of taxation which was delegated to it in and by the said act, establish and maintain a fire department, consisting of a chief officer and various subordinate officers under him, and a force known as a fire department of the city of Louisville; and this defendant says that in obedience to the said legislative mandate, as contained in the said act herein referred to, as approved March 3rd, 1870, by the exercise of the power of taxation therein delegated to it said city did, in the year 1870, establish and has continuously since and does now maintain a fire department consisting of a chief, 13 distinct engine-houses, 13 fire-engines, 13 companies of organized men com-
11 manded and *and* controlled by the officers subordinate to the chief of the fire department and at an annual expense to the city of Louisville of over $2,000,000.00

And this defendant further says that by the provisions of the aforesaid act approved March 3rd, 1870, and act prior thereto power was given to and vested in the said city of Louisville by local taxation upon property in the squares contiguous thereto to cause to be constructed a public fire-cistern at and near the intersection of public ways in the said city and at such places as the local legislature of the said city might determine was most advantageous as a means to furnish water to protect public and private property in the city of Louisville against loss or destruction by fire.

And this defendant says that in the exercise of the power conferred by the said act approved March 3rd, 1870, and acts prior and subsequent thereto the said city of Louisville has at various places and at intersections of the public ways in said city determine- by said local legislature to be most advantageous as a means of protection of public and private property from loss or destruction by fire caused to be constructed at least 500 public fire-cisterns at an average cost per cistern of at least $300.00 and which was paid for by local taxation upon the property in the squares contiguous to the point of their construction.

And this defendant says that to render said fire department of any benefit whatever or to make it in any way available for the purpose of its establishment and maintenance it was on and
12 has been ever since the 3rd day of March, 1870, and is now

necessary and indispensable that the said fire-cisterns and said fire plugs and hydrants in the said city should at all times be kept well and abundantly supplied with water.

And this defendant says that prior to the 22nd day of April, 1882, under its charter it had and was given the right to and did exact and receive from the city of Louisville and the said city of Louisville was required to pay for all water furnished and supplied by this defendant to said public fire-cisterns, public fire plugs and hydrants of and in said city of Louisville, and which water so furnished and supplied by this defendant to the said public fire-cisterns, public fire plugs and hydrants of the city of Louisville was, on the 3rd day of March, 1870, and has been continuously since the year 1870 and now is used and kept only and solely as a protection against loss and destruction by fire of the property of the Commonwealth and of all its citizens so far as situated in the city of Louisville.

And this defendant says that at all times since the 3rd day of March, 1870, *and* has and does now cost this defendant annually at least $20,000.00 to furnish with water and to keep supplied with water said public fire-cisterns and the said public fire plugs and hydrants in the said city of Louisville.

And this defendant further says that by the 6th section of its said charter it is expressly provided that in the laying and construction of its pipes and acqueducts in the city of Louisville the same should be so laid and constructed that an abundant supply of water
13 can be obtained therefrom — the extinguishment of fires, and that this defendant should furnish water to the city of Louisville for the extinguishment of fires and cleaning of its streets upon such terms as may be agreed upon between it and the authorities of the city of Louisville, and that this defendant should have the exclusive right to furnish water to the inhabitants of the said city by means of its acqueducts if the authorities of the said city should agree thereto and upon such terms and for such time as might be agreed upon between this defendant and the said city of Louisville.

And this defendant says that it did so construct its pipes and acqueducts in the city of Louisville than an abundant supply of water could be obtained therefrom for the extinguishment of fires, and that it did furnish and supply the city of Louisville with water for the extinguishment of fires and for the cleaning of its streets upon terms agreed upon between it and the city of Louisville, and the city of Louisville did agree that this defendant might have and has had at all times since its incorporation, by agreement with the city of Louisville, the exclusive right to furnish water to the inhabitants of the said city by means of its said pipes and acqueducts upon terms that were agreed upon by and between this defendant and the said city of Louisville.

This defendant says that it is a private corporation, and that all of its capital stock is now and has at all times since the 3rd day of March, 1870, been owned, held, and possessed by the board of commissioners of the sinking fund of the city of Louisville.

14 This defendant says that the board of commissioners of the sinking fund of the city of Louisville is a body corporate duly created and organized and chartered under and in pursuance of the statute of the Commonwealth of Kentucky approved on the 9th day of March, 1867, and entitled "An act to establish the boundaries and taxable limits and to amend the charter of the city of Louisville;" and this defendant says that all of its capital stock consists of 10,000 shares of $1,000.00 each and is now and has at all times since on and before the 1st day of January, 1880, been the property and assets of the board of commissioners of the sinking fund of the city of Louisville.

And this defendant says that by the act creating the said board of commissioners of the sinking fund of the city of Louisville it was provided that the general council of the said city should have no power to pass ordinances or resolutions to diminish the then resources of said board of commissioners of the sinking fund of the city of Louisville as then established until the debts of the said city of Louisville then or thereafter charged or chargeable upon the board of commissioners of the sinking fund of the said city are paid, but that said general council might pass laws to increase the said resources and assets, and that the same resources and assets of the board of commissioners of the sinking fund of the said city from year to year should be sacredly set apart and applied to the payment of the interest and principal of the debts of the said city of Louisville chargeable upon the board of commissioners of the sinking fund of the said city, and to no other use or purpose,

15 until the whole debt of the city of Louisville should be either paid *and* satisfied, including the then present and any after indebtedness of said city.

This defendant, further answering, says that on the 30th day of March, 1880, the bonded indebtedness of the city of Louisville exceeded the sum of $9,000,000.00, and that by an act of the General Assembly of the Commonwealth of Kentucky approved March 30th, 1880, entitled "An act to amend the charter of the city of Louisville," the board of commissioners of the sinking fund of the city of Louisville was charged with the payment of the bonded indebtedness of the city of Louisville, a charge — then exceeded and which has at all times since exceeded and which now exceeds the sum of $9,000,000.00; and this defendant says further that the assets, property, and resources of the commissioners of the sinking fund of the city of Louisville did at no time on or before March 30th, 1880, nor have such assets, property, or resources of the commissioners of the sinking fund of the city of Louisville at any time since March 30th, 1880, been of value exceeding $4,500,000.00.

And this defendant says that one of the securities, assets, and resources of the commissioners of the sinking fund of the city of Louisville which by a special act approved March 9th, 1867, was expressly set aside and appropriated and provided to be sacredly held, and in nowise diminished, for the purpose of paying said bonded indebtedness of the city of Louisville was and is all of the capital stock of this defendant corporation.

16 This defendant further says that the compensation and pay for water furnished and supplied by it to the public fire-cisterns, public fire plugs and hydrants of the city of Louisville amounted to the sum of about $20,000.00 annually and which was the actual cost to this defendant incurred in furnishing and supplying said water, and which amount the said city of Louisville annually paid to this defendant for said water so supplied and furnished to said public fire-cisterns, public fire plugs and hydrants of the said city, and which sum so received annually by this defendant from the city of Louisville constituted and was the assets, property, and resources of the board of commissioners of the sinking fund of the city of Louisville, which the said act approved March 9th, 1867, had provided should not be diminished or impaired, but sacredly set apart to pay the bonded indebtedness, principal and interest, of the said city of Louisville.

And this defendant says that the General Assembly of the Commonwealth of Kentucky, desiring to relieve the property and residents in the city of Louisville of the burden of taxation to supply said water for the fire plugs and at the same time to keep faith with the creditors of the said city, the payment of whose demands was charged upon the board of commissioners of the sinking fund of the said city and for payment of whose debts the assets, property, and resources of the board of commissioners of the sinking fund was sacredly set apart, entered into a contract with this defendant, by and with the consent and approval of the board of commissioners of the sinking fund of the city of Louisville and the said

17 city of Louisville, to the effect that this defendant should furnish and supply, without cost or charge therefor, an abundance of water to the public fire-cisterns, public fire plugs and hydrants in the city of Louisville as a protection against loss or destruction by fire or public and private property in the city of Louisville, and that in consideration thereof and as a compensation therefor this defendant — its property should be exempt from all liabilities to taxation of its property by either the State, county or city.

And this defendant says that in pursuance of the said agreement there was passed by the General Assembly of the Commonwealth of Kentucky an act approved on the 22nd day of April, 1882, entitled "An act to amend the charter of the Louisville Water Company," and by which, among other things, it was enacted that it should be the duty of the Louisville Water Company to furnish water to the public fire-cisterns, public fire plugs and hydrants of the city of Louisville for fire protection free of charge, and that in consideration therefor the Louisville Water Company should be exempt and released from the payment of taxation of any kind of character, State, municipal, and special, and which amendment was submitted to and approved and became a part of the charter of this defendant on the 22nd day of April, 1882—that is, the board of commissioners of the sinking fund of the city of Louisville and the said city of Louisville and this defendant assented and agreed to the said amendment as a part of the charter of this defendant.

And this defendant says that on and ever since the
18 22nd day of April, 1882, it has continuously and free of charge therefor and without any compensation or reward therefor other than an immunity and exemption of and from taxation secured and granted to it by the said act hereinbefore referred to as approved the 22nd day of April, 1882, and at an annual cost to itself of not less than $20,000.00 and to protect the property of the Commonwealth and its citizens and the lives of the citizens and residents of this Commonwealth, so far as located or resident in the said city of Louisville, from loss or destruction by fire furnished and supplied and kept supplied with an abundance of water and does not furnish and supply with an abundance of water all, each, and every public fire-cistern, public fire plug and hydrant in the city of Louisville.

And this defendant says that the said act of the General Assembly of the Commonwealth of Kentucky approved on the 22nd day of April, 1882, and entitled "An act to amend the charter of the Louisville Water Company," and the acceptance of and consent to the same by this defendant and by the said board of commissioners of the sinking fund of the city of Louisville and by the said city of Louisville as a part of the charter of this defendant, constituted and constitutes a contract by and between the Commonwealth of Kentucky and this defendant and each and every one of the creditors of the said city of Louisville the payment of whose debts is charged upon the assets, property, and resources of the board of commissioners of the sinking fund of the city of Louisville, the said city and the board of commissioners of the sinking fund of
19 the city of Louisville, and that the exemption and immunity from and of taxation secured and given by the said act in consideration of the undertaking to and the supplying by this defendant free of charge the public fire-cisterns, public fire plugs and hydrants in the city of Louisville with water as a protection against loss or destruction by fire of the property of the Commonwealth and of its citizens and the lives of its citizens, so far as located and resident in the city of Louisville, is a vested right resting in a contract as aforesaid and is sustained and supported and protected by the Constitution of the United States.

And this defendant says that it did not on or before nor has it at any time since the first day of January, 1880, nor does it now own or control any other property than that described as belonging to it in the petition herein, and that all and every part of which property was on and before and has continuously been since the first day of January, 1880, and is now necessary and indispensable to the efficient management of its concerns and to enable it to furnish the inhabitants of the city of Louisville with pure, fresh, and wholesome water, to enable it to furnish water to flush and cleanse the public ways in the said city of Louisville, and to enable it to supply with water the public fire-cisterns, public fire plugs and hydrants in the city of Louisville as a protection against loss or destruction by fire of the property of the Commonwealth and of its

citizens and of the lives of its citizens so far as situated and resident in the city of Louisville.

20 And this defendant, further answering, says that the alleged and pretended assessment set up and asserted in the petition in this action *have* for *their* authority an act of the General Assembly of the Commonwealth of Kentucky approved upon the 17th day of May, 1886, and entitled "An act to amend the revenue laws of the Commonwealth of Kentucky," and said pretended assessment and levy asserted and set up in the petition and sought to be enforced herein *as* no other countenance or authority than the said act hereinbefore referred to as approved the 17th day of May, 1886.

And the defendant says that the said act of May 17th, 1886, furnishes the only authority for the pretended and alleged assessment and levy set up and asserted in the petition in this action.

And this defendant, relying upon its said contract as hereinbefore set out and as evidenced by the act hereinbefore referred to as approved on the 22nd day of April, 1882, avers and says that in so far as the said act approved on the 17th day of May, 1886, seeks to authorize, justify, or countenance an assessment of or levy of a taxation upon the property of this defendant that said act approved May 17th, 1886, is in violation of the Constitution of the United States, for the reason that the same impairs the obligation of the contract of the Commonwealth of Kentucky hereinbefore set out by the act hereinbefore referred to as approved April 22nd, 1882.

21 And this defendant pleads and relies upon that provision of the Constitution of the United States making void any law passed by the State impairing the obligation of the contract.

Paragraph 3. This defendant, further answering, avers that the cause of action and the accrual of the right on the part of and in favor of the Commonwealth of Kentucky, if such cause of action or right ever did exist, accrued to the said Commonwealth more than five years prior to the commencement of this action, and this defendant pleads and relies upon the statute of five years' limitation.

Wherefore this defendant prays that the petition be dismissed, and that it have judgment for its costs and for general relief.

WILLIAM LINDSAY,
T. L. BURNETT,
LANE & BURNETT,
Attorneys for Defendant.

Charles R. Long says that he is president of the Louisville Water Company, and that he believes the statements in the foregoing answer are true.

—— ——.

Subscribed and sworn to before me this — day of May, 1891, by Charles R. Long.

—— ——.

22 At a court held for the Jefferson circuit court, law and equity division, on February 20th, 1893.

Came defendant, by counsel, and filed demurrer to the petition herein; which demurrer is set to the 27th inst. for hearing.
Said demurrer is in words and figures following, to wit:

Jefferson Circuit Court, Law and Equity Division.

COMMONWEALTH OF KENTUCKY, &c., Plaintiff-,
vs.
THE LOUISVILLE WATER COMPANY, Defendant. } 4186.

The defendant, The Louisville Water Company, demurs to the petition because it does not state facts sufficient to constitute a cause of action.

T. L. BURNETT,
LANE AND BURNETT, *Att'ys.*

At a court held for the Jefferson circuit court, law and equity division, on 27th day of February, 1893.
Came parties by counsel, and, on motion of defendant, leave is given it to withdraw the demurrer to the petition herein, and defendant moved the court to dismiss this cause; to which plaintiff objects, and said motion, being heard, was submitted, and the court, not being advised, takes time.

At a court held for the Jefferson circuit court, law and equity division, on the 13th day of March, 1893.

23 The court, being advised, ordered that the defendant's demurrer to the petition be overruled; to which defendant excepts, and further ordered by the court the motion to dismiss this cause be overruled; to which defendant excepts.

At a court held for the Jefferson circuit court, law and equity division, on the 3 day of April, 1893.
This day came parties, and by agreement the affirmative allegations of the answer are to be taken as controverted of record.

At a court held for the *court* Jefferson circuit court, law and equity division, on the 10th day of April, 1893.
By consent of parties, by counsel, it is ordered by the court that this case be assigned to April 25th, 1893, for oral argument.

At a court held for the Jefferson circuit court, law and equity division, on the 24th day of April, 1893.
On motion of plaintiff, by counsel, it is ordered by the court that this case be passed to the 27th inst.

At a court held for the *court* Jefferson circuit court, law and equity division, on the 25th day of April, 1893.
On motion of defendant, by counsel, ordered by the court that this cause be assigned to May 8th, 1893, for hearing.

24 At a court held for the Jefferson circuit court, law and equity division, on the 28th day of April, 1893.

Came parties by counsel, and this case, being heard, was submitted, and the court, not being advised, takes time.

At a court held for the Jefferson circuit court, law and equity division, on the 8th day of May, 1893.

The court being advised, it is considered that the plaintiff The Commonwealth of Kentucky recover of the defendant, The Louisville Water Company, the sum of $12,875, with interest from this date; and it is further considered that the plaintiffs recover their costs herein against the defendant; for all of which they may have execution.

To all of which the Louisville Water Company excepts and prays an appeal to the court of appeals; which is granted.

25 *Plaintiff's Depositions.*

Deposition of Henry A. Bell. Filed May 3rd, 1893.

Note Book 347, Journal —.

The deposition- of Henry A. Bell and John T. Tarleton, taken on the 18th day of February, 1893, at the office of Clarence E. Walker, at Louisville, county of Jefferson and State of Kentucky, to be read as evidence on behalf of the plaintiff in an action between H. A. Bell, sheriff, &c., plaintiff, and The Louisville Water Company, defendant, now pending in the law and equity division court, Jefferson circuit court, both parties, by attorney, being present.

Henry A. Bell, being duly sworn and examined by Mr. James P. Helm as attorney for the plaintiff, deposed as follows:

Q. 1. What is your occupation?

A. Sheriff of Jefferson county.

Q. 2. When did you qualify?

A. January, 1891.

Q. 3. The last of January?

A. The first Monday in January—not the 1st day of January.

Q. 4. State whether or not the assessment made in this case was made by you. If so, when?

A. About the 9th of January, 1891.

Q. 5. Did you make that written report to the clerk?

26 A. Yes, sir; to the county clerk.

Q. 6. What did the clerk do with it?

A. Put it on the list of Edwards' Pond and Gilman's Point precinct, 1890.

Q. 7. Have you a certified copy of that assessment made by the clerk?

A. I think I have.

Q. 8. Please file it and make it a part of your deposition.

A. The original of this is filed with the auditor.

Q. 9. Please file a copy of the assessment, then.

A. I file a copy of it as part of my deposition, marked Exhibit H. A. B. No. 1.

Q. 10. Were these taxes demand- of the Louisville Water Company?

A. I sent one of my deputies to demand this bill.

Q. 11. Was that amount demanded of them?

A. Yes, sir.

Q. 12. Will you file a copy of the bill upon which the demand of payment was made?

A. Yes, sir; I file it as part of my deposition, marked Exhibit H. A. B. No. 2.

Q. 13. Did they refuse to pay?

A. Yes, sir.

Q. 14. Was that demand refused?

A. Yes, sir; I looked at it in the books this morning.

Cross-examined by Maj. LANE:

Q. 15. This paper marked H. A. B. No. 1, you say, is a
27 copy of the assessment as made by you?

A. Yes, sir.

Q. 16. Was it made on paper similar to this one?

A. Yes; that is my recollection of it.

Q. 17. Is this a copy of that paper or a copy of the entry in the assessment books?

A. It is a copy of that paper.

Q. 18. It is not a copy of the entry in the assessment book?

A. The copy in the assessment book is the same as that.

Q. 19. Did you compare the two?

A. I read this over this morning and read that over the other day. I read it over in the book and saw the paper at the auditor's office the other day.

Q. 20. The original paper?

A. Yes, sir.

Q. 21. What time in the day was it that you made that assessment?

A. I do not know the time it was made.

Q. 22. What day of the month was it made?

A. To the best of my belief it was made January 9th.

Q. 23. You don't remember the time of day?

A. No, sir. I have written on this bill in my own writing, "January 9th, 1891."

By Mr. HELM:

Q. 24. It was made between the 1st and the 9th?

A. It was made between the 1st and the 9th, and I think it was made on the 9th.

28 Q. 25. To what clerk did you make the report?

A. To the county clerk.

Q. 26. Did you make it to George Webb in person or to a deputy?

A. I don't know about that. I think, however, that Mr. Webb and Mr. Ramsey were both present.

Q. 27. When did the clerk record that assessment you made?
A. My recollection is that he recorded it at once.
Q. 28. Did you see him record it at once?
A. No, sir; I did not see him record it.
Q. 29. You don't know that it was recorded on the 9th?
A. I could not say positively, but that is my recollection. My recollection is that it was recorded right immediately; that he went right off and had one of the men out it on the book the very day I gave it to him.
Q. 30. Which deputy was it?
A. I do not know.
Q. 31. Did you put it on the assessment book for the year 1886?
A. No, sir; on the book for 1890.
Q. 32. The assessment book for 1890 contained an assessment of the property of the water company?
A. I am not certain.
Q. 33. If it was on the assessment book for 1890 there was two assessments against the water company?
A. I don't remember whether the water company was assessed for 1890 or not. My belief is that it was. It is customary to put them on the list on the assessor's books. That is in the hands
29 of the assessor.
Q. 34. It was not put on the assessment book for 1886?
A. No, sir.
Q. 35. You do not know of your own knowledge that it was recorded on the 9th of January, 1891?
A. The clerk told me that he would record it immediately. I did not see him record it, but he reported to me that he had recorded it.
Q. 36. What sort of a report did he make, verbal or written?
A. Verbal.
Q. 37. What report did the clerk make to you on the 9th of January, 1891?
A. In reference to this matter?
Q. 38. What paper was given you?
A. I think he returned to me the original assessment and I mailed it to the auditor, the assessment we made, certifying it had been recorded.
Q. 39. Did you have any paper in your hand given to you on the 9th of January, 1891, by the clerk?
A. If I had any it was that paper.
Q. 4-. Have you any record in your office to show that you had it?
A. No, sir; we put it on the book we had in our office. I see it is on the book. I don't know who put it on, but I believe I put it there myself.
Q. 41. Then you did keep a memorandum?
A. We put it on that book.
30 Q. 42. Was that made the 9th of January, 1891?
A. I am not certain about that.
Q. 43. Did you put it on the book the 9th of January, 1891?

A. I am not certain about that. I either put it on the book or a copy of it. That book that we call additional assessment book; it is on that.

Q. 44. That is a book made out by either you or your deputies?

A. Yes, sir.

Q. 45. And not entirely by yourself?

A. No, sir.

Q. 46. That is a private book of your own?

A. Yes, sir.

Re-examined by Mr. HELM:

Q. 47. Examine the petition and note the fact that it was filed on the 9th of January, 1891.

A. Yes, sir.

Q. 48. By way of refreshing your memory, I will ask you to state whether or not you did not give me this identical paper to file with the petition before the petition was filed, and I ask you to read the petition and see if it is not stated there that it was filed with the petition.

A. Since you mention it, I believe that is so. I see that Ramsey's name is signed there.

Q. 49. State whether or not you were not advised at the time what would be the limitation and whether or not the filing and the whole matter was not completed and the demand made before the bring- of the suit.

31 A. Yes, sir; I was advised that it had to be made at that time for it to be done.

Q. 50. Immediately for the thing to be completed?

A. For the whole thing to be completed in one day.

Q. 51. With that information, state whether or not you did not see to it that the thing was completed in one day.

A. Yes, sir.

Q. 52. Everything necessary?

A. Yes, sir. I don't suppose that I saw the clerk put it down, but I told them so.

Recross-examined by Maj. LANE:

Q. 53. Who made the demand for the taxes?

A. John Tarleton.

Q. 54. You don't know whether he made the demand or not?

A. He told me he had.

Q. 55. Did you make any demand yourself?

A. No, sir.

Q. 56. You do not know that any demand was made?

A. No, sir.

Deposition of John Tarleton. Filed May 3rd, 1893.

JOHN T. TARLETON, called for the plaintiff, being duly sworn and examined by Mr. Helm, deposed as follows:

Q. 1. State your name, age, residence, and occupation.
A. John T. Tarleton; deputy sheriff.
Q. 2. Were you a deputy sheriff between the 1st and 10th of January, 1891?
A. I was.
32 Q. 3. Under Henry Bell, sheriff of Jefferson county?
A. Yes, sir.
Q. 4. State whether or not you ever made a demand on the Louisville Water Company for the taxes for 1886; and, if so, if you can, state when you made that demand.
A. I made the demand, but I cannot say exactly when I made it.
Q. 5. Can you state whether you made that demand before the bringing of this suit, on the 9th of January?
A. Yes; I can state that I made the demand before the bringing of this suit.
Q. 6. On whom did you make that demand?
A. On Charles R. Long, president of the Louisville Water Company.
Q. 7. Did he refuse to pay it?
A. Yes, sir.

Cross-examined by Mr. LANE:

Q. 8. Where was Charles R. Long when you saw him?
A. The best of my knowledge is that he was in the sitting-room of his residence, on Broadway.
Q. 9. Do you remember what time of day it was?
A. No, sir.
Q. 10. Was it in the morning or in the evening?
A. In the evening, I think.
Q. 11. About what time?
A. I cannot say to save my life.
Q. 12. Was it in the afternoon or in the evening after supper that you saw him?
33 A. I could not say.
Q. 13. You just made a demand on him, and that is all you know?
A. Yes; and that it was before the bringing of the suit.
Q. 14. When was the suit filed; do you remember?
A. No, sir.
Q. 15. Were you present when it was filed?
A. No, sir.

Re-examined by Mr. HELM:

Q. 16. How do you know the demand was made before the suit was filed?

A. Simply from the fact that you told me that you could not file it until I made the demand, and then I made it and came back and reported to you that I had made it.

Q. 17. And then did I start off to file the suit?

A. Yes; to the best of my knowledge.

STATE OF KENTUCKY, }
County of Jefferson. }

Law and Equity Div. Jeff. Circuit Court.

I, Clarence E. Walker, official reporter for said court, certify that the foregoing deposition- of Henry A. Bell and Jno. T. Tarleton — taken pursuant to agreement before me at the time and place and in the action mentioned in the caption; that the said witness- *was* first duly sworn by me that the testimony *he* should give in the action should be the truth, the whole truth, and nothing but
34 the truth; that said depositions were first taken by me in shorthand and a full and accurate transcript of the same made by me; that the signature- of the witness- to said depositions respectively and the reading of the same to them were waived by counsel; that plaintiff appeared by Mr. Helm and defendant Maj. Lane.

Witness my hand this 2 day of May, 1893.

CLARENCE E. WALKER,
Official Reporter.

Exhibit H. A. B. No. 1, filed with the deposition of H. A. Bell, is in words and figures following, to wit:

Additional list on revenue account 1886 taken by H. A. Bell, sheriff of Jefferson county, and recorded in the county clerk's office and certified back to the sheriff of said county for collection in accordance with chapter 1233, approved May 17, 1886, entitled "An act to amend the revenue laws of the Commonwealth of Kentucky."

Read the law on the back of this blank.

No., name, year, precinct, description of propt., valuation, am't of.—Louisville Water Co., 1886, 88.56 acres of land in Edwards' Pond & Gilman's magisterial dist. of Jefferson county, Ky., near the land of Callahan...	8800
28.52 acres of land near the lands of F. Wall, Sr.....	2800
1.28 acres n'r Callahan's tract.....	200
100 acres & 10 acres & 2.49 — in the Crescent Hill reservoir tract.....	1300
35 A tract of land purchased of H. A. Meyer near the Callahan tract.....	300

Two certain lots of land in Louisville, Ky., on the east side of 3rd street between Green and Walnut, having a front on 3rd St. of 52½ x 234 ft., the other fronting the west side of an alley bet. 2 & 3 & Green & Walnut, having a front on said alley of 20 feet & a depth of 120 ft., being lots #12 & 10 of bl'k 41 on city map on file in the assessor's office of the city of Louisville 10000

Also all the pipes and mains running to and from said city & under the streets and alleys of said city; also all buildings, reservoirs, engines, pumping stations, &c., belonging to the Louisville Water Co., of the total value of..... 2466600

2500000

@ 51c. p'r 100..... 12,75000

A true copy of assessment.
Attest:

GEO. H. WEBB,
Clerk Jeff. Co. Court,
By JNO. M. RAMSEY, *Dep. Cl'k.*

Totals, —.

Sheriff sign at the end of report.

——— ———,
Sheriff —— County.

STATE OF KENTUCKY, }
—— *County,* } *sct:*

I, —— ——, clerk of —— county court, hereby certify that
36 the foregoing lists of property, omitted by the assessor in the tax assessment for 18—, were assessed and reported to me by —— ——, sheriff of —— county, and recorded in my office as prescribed by law.

Witness my official signature this — day of ——, 18—.

——— ———,
Clerk — County Court.

CHAPTER 1233.

An act to amend the revenue laws of the Commonwealth of Kentucky; approved May 17, 1886.

Article VI.

22. When it shall be known to the sheriff that any person has failed to give in a list of his taxable property, or any portion thereof, in any year, he shall report such person to the county clerk, to be dealt with, fined and taxed as delinquents reported by the assessor. No sheriff or assessor shall be liable to cost in proceedings against delinquents reported by them.

23. Any person who has failed to give in his list of *table* property,

in whole or in part, because he was not called upon by the assessor, may, at any time, and it is hereby made his duty, after the assessor has returned his tax book, to list the same with the county clerk, who, on taking the same, shall be governed by the law regulating the duty of the assessor.

25. It shall be the duty of the sheriff to report to the county clerk all lists or parts of lists of property which may, for any year or years, have been omitted by the assessor, and all property which corporations may have omitted for any year or years to have
37 listed with the auditor, and said clerk shall enter the same on the assessor's books for his county, and certify the same to the auditor on or before the last day of January in each year; and the said sheriff shall have, as compensation for said assessment, twenty-five cents, and, in addition to the fee, twenty-five per cent. on the taxes realized on said assessment. But this section does not include property erroneously described by the assessor.

26. No sheriff shall receive taxes on property until the same has been entered upon the assessor's books and certified to the sheriff by the county clerk. For each violation of this section by sheriff or collector, they shall be fined twenty dollars, which may be recovered by the Commonwealth by motion in the county court or by indictment in the circuit court. The county attorney, if he prosecutes, shall have twenty per cent. of the fine. Nothing in this section shall be construed to give a portion of the fine under this section to the clerks.

Exhibit H. A. B. No. 2, filed with the deposition of H. A. Bell, is in words and figures following, to wit:

The Louisville Water Company to State tax 1886.

88.56	acres land		8800
28.52	"	"	2800
1.28	"	"	200
2.49	"	"	300
100	"	"	10000
10	"	"	1300
37½			
52½ x 234 feet E. 3rd Green & Walnut			10000
Pipes, mains, & reservoir			2466660
Total			2500000
Tax			$1275000

Louisville Jan. 9, 1891.
[Receipt payment.

H. A. BELL, *S. J. C.*]*

[* Words enclosed in brackets erased in copy.

38 *Defendant's Deposition.*

Deposition of Charles R. Long. Filed April 10th, 1893.

Jefferson Circuit Court, Law and Equity Division.

COMMONWEALTH OF KENTUCKY and H. A. BELL, Sheriff, Plaintiffs,
vs.
THE LOUISVILLE WATER COMPANY, Defendant. } =4186.

The deposition of Charles R. Long, taken on the 21st day of March, 1893, 12.30 o'clock a. m., at the law office of Lane and Burnett, cor. Centre & Green Sts., Louisville, Ky., to be read as evidence in behalf of defendant in an action between The Commonwealth of Kentucky, &c., plaintiffs, and The Louisville Water Company, defendant, pending in the Jefferson circuit court, law and equity division.

CHARLES R. LONG, being duly sworn and examined by H. M. Lane, testified as follows:

Q. 1. State your name, residence, and occupation or profession.
A. Charles R. Long; 109 E. Broadway, Louisville, Ky.
2. Have you any connection with the defendant, The Louisville Water Company?
A. President.
3. How long have you been such?
A. About 17 years.

39 4. State whether or not the Louisville Water Company furnished water to the public fire-cisterns and public fire plugs and hydrants of the city of Louisville for fire protection free of cost during the entire period extending from April 22nd, 1882, up to the 1st day of January, 1887.

A. We have rendered such service to the city as indicated free of charge during that period.

5. What would be the actual cost per annum for furnishing the water free of charge during that interval of time—what was the cost to the Louisville Water Company?

A. It would be almost impossible to fix the actual cost to the water company.

6. About what would be the cost?

A. There is no way of ascertaining the amount of water these cisterns have used, from the simple fact that they have no meters attached to them.

7. In your best judgment would it run up to $15,000.00 a year?

A. I think not. I would say it would cost the water company in the neighborhood of twelve or eighteen thousand dollars a year, actual cost.

8. That is as near as you can say the actual cost was from the 22nd of April, 1882, up to the 1st of January, 1887?

A. Yes, sir.

9. State whether or not the property described in the pleadings in this case is necessary and indispensable to the convenient management of the concerns of the company.

A. All the property owned by the water company is necessary and needful for the purposes of the company in conducting its business.

40 10. Could it carry on its business without the property described in the pleadings in this case?

A. It could not conveniently do so nor successfully.

11. About what did it cost the water company to construct its entire plant of reservoirs and pipeways in the city?

A. It has cost the company in the neighborhood of three million dollars.

12. State what connection this water has that is furnished by the Louisville Water Company to the city of Louisville with the fire department of the city.

A. The service rendered by the water company to the city is an absolute necessity for the maintenance of the fire department of the city of Louisville because it supplies direct all the water needed for the public fire service.

13. State whether or not the public fire service of the city of Louisville could be conducted and carried on without this supply of water furnished by the water company.

A. It could not to any extent.

14. State, as near as you can, the value of the property in the city of Louisville that derives protection from destruction by fire.

A. I think it would run up in the neighborhood of one hundred millions of dollars.

15. Do you know or have you any idea of the number of fire-cisterns in the city of Louisville?

A. 700 fire cisterns and public hydrants.

16. At what points are they located, not specifically, but generally?

41 A. They are located generally over the city in the public ways of the city under and by the direction of the general council of the city.

17. What persons or corporations own the stock of the Louisville Water Company?

A. The Louisville sinking fund—the board of commissioners of the sinking fund own all the stock with the exception of two shares.

18. What is the value of those shares, the nominal value?

A. Par value, $100.00 each.

19. What connection does the sinking fund have with the city of Louisville? What office does it perform in the local government of the city?

A. It takes care of the bonded indebtedness of the city, makes provision for its payment, and collects the revenues belonging thereto.

20. Mr. Long, when did you first hear of the assessment for the year 1886 of the property and effects of the Louisville Water Company for taxation by the State?

A. I never heard of any assessment being made at all. The first knowledge I had that there was any claim against the water company for taxes for that year was presented to me—I made a memorandum at the time—was presented to me January 9th, 1891, in the shape of a tax bill.

21. By whom was it presented; at what time of the day?

A. By one of the deputies, claiming to represent H. A. Bell, sheriff, and was presented about 5 o'clock on the evening of January 9th, 1891.

42 22. Where were you at the time it was presented?

A. At the water office, in the board of directors' room.

23. Was that after the business hours?

A. Yes, sir; after public hours.

24. Were the banks closed after that hour?

A. The banks were closed—that is, so far as public business was concerned. Here is a copy of the tax bill they presented that day.

25. Mr. Long, why was it that the defendant in this case furnished the water free of charge for the time you have named?

A. In consideration of the fact that the water company was to be exempt from State and municipal taxation.

26. From April 22nd, 1882?

A. Yes, sir.

27. Do you know what time the court-house closes—what time of the day?

A. I do not. The impression I have it closes at five o'clock, as far as its offices are concerned.

Cross-examined by J. P. HELM, for plaintiff:

28. How do you arrive at the cost of furnishing that water, Mr. Long?

A. The only method of arriving at the cost is to approximate the quantity of water used, and the cost of the water per hundred gallons is between five and six cents.

29. How do you arrive at the aggregate amount of water that is delivered through the medium of the public fire plugs, cis-

43 terns, and hydrants?

A. We cannot arrive except by approximation. There are no meters. When a fire takes place the use of the water is simply immense. It takes all the main will supply.

30. How do you estimate the amount?

A. We are unable to estimate it except by general approximation as to what has been the possible cost.

31. Do you know the amount?

A. I did not come here to state figures. The only way to approximate that will be to make an estimate. We could not get the amount unless we had meters on all of them.

32. Have you ever made an estimate of the total amount of water used by the fire plugs and hydrants?

A. I have made an estimate of the cost as indicated.

33. That related to the cost of delivery all over the city?

A. Yes, sir.

34. Do you know the estimate of the cost of water used for this purpose furnished free?

A. No, sir.

35. I wish you would find out about what estimate of the approximate amount of water is used for this purpose and how you arrive at that.

A. I have just said all there was to say on the subject.

36. Do you decline to say any more?

A. It is impossible to state the amount of water used for fire cisterns during a fire and the amount of water used or water wasted by leaky cisterns in this city.

By Judge BURNETT:

37. Do you know the quantity used by the city?

44 A. Twelve to sixteen millions of gallons. We know how much is consumed by meter measurement, and the balance is consumed by other consumers.

By Mr. HELM:

38. How much—have you the figures convenient?

A. No, sir; I have made no examination of those figures recently.

39. Did you ever make a calculation as to what the proportion of water furnished for fire protection bears to the total amount furnished?

A. No, sir.

40. Have you any means of making an estimate upon that?

A. We have not. We can make no estimate except by approximation.

41. How do you arrive at that?

A. Only by the fact that there is a three or four inch service to the cistern, and that the volume of water furnished through that service constantly is a very large consumption of water. Our engineer can give you the approximate amount. These cisterns have large connections and when being supplied with water take all the supply of the public mains.

42. You furnished this free of charge, the water for public fire cisterns, plugs, and hydrants?

A. Yes, sir.

43. Is this water used for any other purpose from these mains?

A. It is used to flush the streets and gutters.

45 44. And that's all?

A. And the walks are washed when they need it.

45. None of this water is used for private consumers?

A. Only when it is stolen.

46. And there is a great deal of that done, you suspect?

A. More than you would suppose.

47. The city furnishes the water free of charge to the fire plugs and cisterns?

A. It has made no charge yet.

Signature waived.

STATE OF KENTUCKY, }
County of Jefferson. }

I, F. Hewitt Weller, examiner in and for the county of Jefferson, State of Kentucky, do certify that the foregoing deposition of Charles R. Long was taken before me at the time and place and for the purpose stated in the caption; that the said witness was duly sworn, before giving it; that it was written by me in his presence, and that the reading of same to witness and his signature thereto were waived by consent of counsel, all parties being present by counsel.

Given under my hand this 10th day of April, 1893.

F. HEWITT WELLER,
Ex., Jeff. Co., Ky.

46 STATE OF KENTUCKY, }
Jefferson County. }

Jefferson Circuit Court, 30th Judicial District.

I, John S. Cain, clerk of the circuit court, do hereby certify that the foregoing 45 pages contain a full, true, and complete transcript of the record and proceedings had in the Louisville law and equity court and in the Jefferson circuit court, law and equity division, in an action lately pending therein wherein Commonwealth of Kentucky is plaintiff and Louisville Water Company is defendant, # 4186, as the same appears of record and on file in my said office.

Witness my hand this 28 day of June, 1893.

JNO. S. CAIN,
Clerk Jefferson Circuit Court.

Endorsed upon the foregoing transcript is the following statement:

Court of Appeals.

LOUISVILLE WATER CO., Appellant, }
vs. }
COMMONWEALTH OF KENTUCKY, Appellee. }

This appeal is from the judgment of the law & equity division of the Jefferson circuit court, rendered May 8, 1893, found on page 24 of the transcript. Appeal was prayed and granted in the court below. No summons or warning order necessary.

T. L. BURNETT,
LANE A BURNETT,
Att'ys for Appellant.

47 Afterwards, at a court of appeals held in and for the Commonwealth of Kentucky, at the capitol, in Frankfort, on the 28th day of September, A. D. 1893, the following order was entered:

Submission.

Jefferson.

"LOUISVILLE WATER CO., Appellant,
vs.
COMMONWEALTH OF KENTUCKY, Appellee.

It is ordered that this cause be submitted."

Afterwards, at a court of appeals held in and for the Commonwealth of Kentucky as aforesaid, on the 27th day of March, A. D. 1896, the following orders and judgment were entered:

Judgment.

LOUISVILLE WATER CO., Appellant.
vs.
COMMONWEALTH OF KENTUCKY, Appellee.

Appeal from the Jefferson circuit court, law and equity division.

The court being sufficiently advised, it seems to them there is no error in the judgment herein.

It is therefore considered that said judgment be affirmed, which is ordered to be certified to said court.

It is further considered that the appellee recover of the appellant its cost expended herein.

On the same day the court, through Judge Guffy, delivered the following opinion:

48 LOUISVILLE WATER CO., Appellant,
vs.
COMMONWEALTH OF KENTUCKY, Appellee.

This appeal is prosecuted by Louisville Water Company from a judgment rendered by the Jefferson circuit court, law and equity division, in the suit of the Commonwealth of Kentucky and H. A. Bell, sheriff of Jefferson county, against Louisville Water Company to recover for taxes due for the year 1886.

The appellant interposed several defenses, all of which were deemed insufficient by the court below, and appellant now insists that the court below erred in rendering judgment against it and asks a reversal.

The authority for reporting the tax-list to the clerk of the county court is to be found in section 25, article 6, chapter 92, of the General Statutes, commonly called the Hewitt bill. The material part of the section is as follows: "It shall be the duty of the sheriff to report to the county clerk all lists or parts of lists of property which may for any year or years have been omitted by the assessor and

all property which corporations may have omitted for any year or years to have listed with the auditor, and said clerk shall enter the same on the assessor's book for his county and certify the same to the auditor on or before the last day of January in each year."

The law does not specify how or in what manner or form the report shall be made, and as it appears that the clerk accepted
49 the report and certified same, as required by law, the report of the sheriff and certificate of the clerk must be held sufficient for the purposes of this action.

The act of 1882, exempting appellant from the payment of taxes, had been decided to be unconstitutional and void in case of William Clark, sheriff, *vs.* Louisville Water Company, 90th Kentucky, 515; hence that act cannot be relied on for reversal. The question of the constitutionality of that act was not decided by the Supreme Court of the United States; therefore the decision in case of the appellant *vs.* the Commonwealth, 143 U. S, 1, has no application to this case. The plea of limitation cannot avail. The suit was brought and summons issued January 9th, 1891, which, by the express provision of the code of practice, is made the commencement of the action, and this court has often so held; hence the decision of the courts of other States as to what constitutes the commencement of an action can have no application to the case at bar, and, besides, it might well be held that the statute did not begin to run until the expiration of the time during which the assessor might have made the assessment, which in 1886 would have been the last of April.

The act of 17th of May, 1886, before referred to, was, as is well known, a revenue bill, and the object was to increase the revenues, not to decrease them, and it expressly excepted all obligations incurred under existing laws from repeal. It is therefore clear that if appellant had become liable for the tax for 1886 the act *supra* did not release it from such liability, nor can we agree with appellant that the act *supra* is only prospective. The evident
50 purpose of the act was to confer power upon the sheriff greater than he had theretofore been invested with, and there is nothing in the act to authorize the conclusion that the power and duty devolved on the sheriff had reference only to the future. Such an intent would not have been consistent with the object of the act.

Appellant insists that the revenue law of 1892 repealed the act of 1890, which authorized the bringing of such suits as this. We do not concur in appellant's construction of the act of 1892. We do not think it was the intention of the legislature to repeal the act of 1890; but if such was the legislative intent, the general law as to construction of statutes provided that "No new law shall be construed to repeal a former law as to any offense committed against the former, nor as to any act done, any penalty, forfeiture, or punishment incurred, or any right accrued or claim arising under the former law, or in any way whatever to effect any such offense or act so committed or done, or any penalty, forfeiture, or punishment so incurred, or any right accrued or claim arising before the new law takes effect."

It is certain that the claim in suit existed before the passage of the act of 1892, and the right to sue therefor had accrued and in fact had been exercised before the enactment of the law of 1892; hence the claim and the right to sue and recover therefor was wholly unaffected by the act of 1892. The question as to whether it was a vested right that could not have been repealed or taken away is not the question before us for decision. The simple question is, Did the act of 1892 have the effect contended for by appellant? We
51 think not. We think it fair to presume that the depositions in the case were properly filed and considered; if such was not the case, appellant should, by proper proceedings in the court below, — sought a correction of the error, if it deemed the same prejudicial, and if the failure to file the exhibits referred to in the petition was detrimental to appellant that could have been remedied by rule in the court below. We have read with care the very excellent and exhaustive briefs of appellant as well as the entire record, and are of the opinion that the judgment of the court below is sustained by the law and facts, and the said judgment is affirmed.

Afterwards, on the 5th day of May, A. D. 1896, the appellant and plaintiff in error filed in the clerk's office of said court of appeals a copy of its writ of error, the original of which here follows:

52 *Writ of Error.*

UNITED STATES OF AMERICA, } *ss*:
District of Kentucky, }

The President of the United States of America to the honorable the judges of the court of appeals of the State of Kentucky, Greeting:

Because *of* the record and proceedings and also in the rendition of the judgment of a plea which is in said court of appeals, before you or some of you, being the highest court of law or equity of the said State of Kentucky in which decision could be had in the said suit between The Louisville Water Company, appellant, and The Commonwealth of Kentucky, appellees, wherein was drawn in question the validity of a treaty or statute of or an authority exercised under the United States and the decision was against their validity, or wherein was drawn in question the validity of a statute of or an authority exercised under said State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such their validity, or wherein was drawn in question the construction of a clause of the Constitution or of a treaty or statute of or commission held under the United States and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of said Constitution, treaty, statute, or commission, a manifest error hath happened, to the great damage of the said appellant, as by its com-

53 plaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington within thirty days from the date hereof, in said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court, the 5th day of May, in the year of our Lord one thousand eight hundred and ninety-six, and of the Independence of the United States of America the one hundred and twentieth.

[Seal 6th Circuit Court, Ky. Dis., U. S. of America.]

THOS. SPEED,
Clerk of the Circuit Court of the United States, District of Kentucky.

Allowed by chief justice of the court of appeals of the State of Kentucky.

WILL S. PRYOR,
Chief Justice Ky. Ct. Appeals.

[Endorsed:] 1896, May 5, filed. Att.: A. Addams, C. C. A.

54 On the same day the appellant and plaintiff in error filed its assignment of errors, which is in words and figures following, to wit:

Court of Appeals.

THE LOUISVILLE WATER COMPANY, Plaintiff in Error,
vs.
THE COMMONWEALTH OF KENTUCKY, Defendant in Error. } 104.

The Louisville Water Company, plaintiff in error, comes and complains of the judgment rendered herein by the court of appeals of the Commonwealth of Kentucky. The said court had jurisdiction of the subject-matter of the litigation and is the highest court in said Commonwealth having such jurisdiction, and its said judgment is final, and for cause of complaint said plaintiff in error, The Louisville Water Company, assigns errors as follows:

First. The court of appeals erred in affirming the judgment of the Jefferson circuit court, law and equity division, heretofore known and styled the Louisville law and equity court.

Second. The court of appeals erred in adjudging that the properties of the plaintiff in error were subject to taxation by the Commonwealth of Kentucky at any time between the 22nd day of April,

1882, and the 15th day of September, 1886, or that the properties of the plaintiff in error could be so subjected without violating the Constitution of the United States.

55 Third. The court of appeals erred in failing and refusing to reverse the judgment of the Jefferson circuit court, law and equity division, heretofore known and styled the Louisville law and equity court, and in failing to adjudge that the properties of the defendant in error were exempt from liability to taxation by the Commonwealth of Kentucky prior to the repeal on the 15th day of September, 1886, by an act entitled "An act to amend the revenue laws of the Commonwealth of Kentucky," approved May 17th, 1886, of the provisions of an act approved April 22, 1882, entitled "An act to amend the charter of the Louisville Water Company."

Fourth. The court of appeals erred in adjudging that the act of the General Assembly of the Commonwealth of Kentucky approved on April 22nd, 1882, entitled "An act to amend the charter of the Louisville Water Company," after being accepted by the plaintiff in error and its conditions performed by the plaintiff in error in the supplying of water for public purposes to the city of Louisville free of charge up to September 15th, 1886, did not constitute a legal, valid, and enforcible obligation and contract between the Commonwealth of Kentucky and the plaintiff in error.

Fifth. The court of appeals erred in adjudging that the said contract was not supported by a legal and valuable consideration upon the part of the plaintiff in error.

Sixth. The court of appeals erred in adjudging that the authority exercised under, in the name and for the benefit of, the Commonwealth of Kentucky in the assessment of the property of the plaintiff in error for taxation and in attempting to enforce the collec-

56 tion of such taxes does not impair the obligation of the contract involved in the acceptance by the plaintiff in error of the provisions of the act approved April 22nd, 1882.

LOUISVILLE WATER COMPANY,
By T. L. BURNETT,
LANE & BURNETT, *Attorneys.*

And on the same day the appellant and plaintiff in error filed its bond in words and figures following, to wit:

Supersedeas Bond.

COMMONWEALTH OF KENTUCKY:

LOUISVILLE WATER COMPANY, Appellant,
vs.
COMMONWEALTH OF KENTUCKY, Appellee.

Know all men by these presents that we, The Louisville Water Company, principal, and Charles R. Long, surety, are held and firmly bound unto the Commonwealth of Kentucky in the sum of

$25,000.00, to be paid to the said Commonwealth of Kentucky, and to which payment, well and truly to be made, we bind ourselves and each of us, jointly and severally, and our and each of our heirs, executors, and administrators, firmly by these presents.

Sealed with our seals and dated this the — day of May, 1896 A. D.

Whereas the above-named Louisville Water Company hath prosecuted a writ of error to the Supreme Court of the United
57 States to reverse the judgment rendered in the above-entitled suit by the court of appeals of Kentucky:

Now, therefore, the condition of this obligation is such that if the above-named Louisville Water Company shall prosecute its writ of error to effect and answer all damages and costs if it shall fail to make good its plea, then this obligation shall be void; otherwise the same shall remain and be in full force and virtue.

LOUISVILLE WATER COMPANY, [L. S.]
By CHAS. R. LONG, *President.* [L. S.]
CHAS. R. LONG. [L. S.]

Sealed and delivered and taken and acknowledged before me on this the 4 h day of May, 1896, by the Louisville Water Company and Charles R. Long.

WM. J. INGRAM, *N. P., J. C.*

Examined and approved by me this the 5 day of May, 1896.

WILL S. PRYOR,
Chief Justice of the Court of Appeals of Kentucky.

58 COMMONWEALTH OF KENTUCKY:

I, Abram Addams, clerk of the Kentucky court of appeals, in obedience to the writ of error herewith returned, a copy of which is on file in my office, hereby certify that the preceding fifty-seven (57) pages contain a true, full, and complete transcript of the record and proceedings had in said court of appeals in the case of Louisville Water Company, appellant, against The Commonwealth of Kentucky, appellee, as the same appear of record and on file in my office.

Seal Court of Appeals, Kentucky.

In testimony whereof I have hereunto set my hand and affixed the seal of my office. Done at Frankfort, Kentucky, this 8th day of May, A. D. 1896.

ABRAM ADDAMS,
Clerk Kentucky Court of Appeals.

Fee for this transcript, $18.25.

59 UNITED STATES OF AMERICA, } ss:
District of Kentucky, }

To the Commonwealth of Kentucky, acting through W. O. Bradley, its governor; W. S. Taylor, its attorney general, and James P. Helm and Helm — Bruce, special counsel of the Commonwealth of Kentucky:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States, to be held at Washington, in the District of Columbia, not exceeding thirty days from this date, pursuant to writ of error filed in the clerk's office of the court of appeals of Kentucky, wherein The Louisville Water Company is the plaintiff in error and you are the defendant in error, to show cause, if any shall be, why the judgment in said writ of error mentioned should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable W. S. Pryor, chief justice of the court of appeals of Kentucky, this the 5 day of May, in the year of our Lord eighteen hundred and ninety-six.

WILL S. PRYOR,
Chief Justice of the Court of Appeals of Kentucky.

60 [Endorsed:] Ent. 362. Serve Taylor, Bradley, Helm & Bruce, J. P. Helm.

Executed this paper by delivering a true copy thereof to W. O. Bradley, governor of Kentucky, at Frankfort, on the 7th of May, 1896, and mailed a copy thereof to the within-named W. S. Taylor, att'y gen'l of Kentucky, as he could not be found in his office at Frankfort this May 7th, 1896.

JAMES BLACKBURN,
U. S. Marshal.

Put my fees.

Executed on J. P. Helm May 8, '96, at Louisville by delivering to him two copies of the within. Executed on Helm — Bruce 5, 8, '96, by delivering copy of within to J. P. Helm, who accepted this service.

JAMES BLACKBURN, *U. S. M.*,
By S. E. BLACKBURN, *D. M.*

Mars. fees	6 00
Mileage	3 30
	9 30

Endorsed on cover: Case No. 16,301. Kentucky court of appeals. Term No., 525. The Louisville Water Company, plaintiff in error, *vs.* The Commonwealth of Kentucky. Filed May 16, 1896.

No. 179.

Brief of Helm & Bruce for D. E.

Filed Jan. 16, 1897.

Office Supreme Court, U.S.
FILED
JAMES H. McKENNEY,
CLERK.

Supreme Court of the United States.

Louisville Water Company, ... Plaintiff in Error,

versus

Commonwealth of Kentucky, . . . Defendant in Error.

BRIEF FOR DEFENDANT IN ERROR ON MOTION TO DISMISS OR AFFIRM.

JAMES P. HELM,
HELM BRUCE,
Counsel.

Supreme Court of the United States.

LOUISVILLE WATER COMPANY . . . . . *Plaintiff in Error,*

vs.

COMMONWEALTH OF KENTUCKY . . . *Defendant in Error.*

BRIEF FOR DEFENDANT IN ERROR ON MOTION TO DISMISS OR AFFIRM.

STATEMENT.

Suit was brought by the Commonwealth of Kentucky and H. A. Bell, Sheriff, against the Louisville Water Company in January, 1891, seeking to collect from the Water Company taxes due the State for the year 1886. The property had not been assessed in 1886, but was subsequently, in 1891, reported by the Sheriff as "omitted property," and was thereupon assessed as of January 10, 1886. And this action was brought to collect the taxes due upon that assessment.

At the time this assessment was made and this action instituted, January, 1891, there was in effect a general revenue statute, approved May 17, 1886, and which is commonly known in the legislative and judicial history of Kentucky as the "Hewitt Act." (General Statutes of Kentucky, editions of 1887 and later, chapter 92.) But the tax involved in this action, being the tax for the year 1886, had been imposed as of the 10th of January of that year under and by the law in force prior to the adoption of the Hewitt Act of May 17, 1886; and, accordingly, the amount claimed as taxes due from the Water Company for the year 1886 was ascertained according to the rate of taxation which prevailed on January 10, 1886, which was 51½ cents on each $100 of value. (Record page 2.) Though the act of May 17, 1886, imposed a tax rate of 47 cents on each $100 of value. (Appendix I.) And the tax rate in force for the year 1891, the year the assessment was actually made by the Sheriff, was 42 cents on the $100 of value. (Appendix II.)

The defendant Company made a number of defenses to the action.

Among other defenses, it claimed that the Hewitt Act of May 17, 1886, had repealed all prior taxing statutes, and hence had released the defendant from its obligation to pay the tax of 1886, if any such obligation had ever existed. To this the Court of Appeals of Kentucky responded by calling attention to the fact this Hewitt Act "expressly excepted all obligations incurred under existing laws from repeal." (Record page 27.)

Defendant also contended that by an act of the Legislature of Kentucky, approved April 22, 1882, and accepted by defendant, its property had been exempted from taxation; and that thereby a contract of exemption had been made with the State; and that defendant's property was therefore not subject to taxation in 1886. Upon this question the Court of Appeals simply held that this exempting Statute had been held to be unconstitutional by the Court of Appeals in the case of Clark, Sheriff, vs. the Louisville Water Company, 90 Ky. 515; and hence this defense was not maintainable. (Record page 27).

Other defenses were made which it is not material now to mention; but all of which were overruled by the Court of Appeals, and the judgment of the lower court in favor of the State for the amount of the tax was affirmed. And the Water Company has now brought the case to this court by writ of error.

The plaintiff in error is the same corporation which was plaintiff in error in the case of the Louisville Water Company vs. Commonwealth of Kentucky, heretofore decided by this court, the opinion being reported in 143 U. S. 1. There is this difference, however, between that case and this one. That case involved the tax for the year 1887, the year subsequent to the passage of the Hewitt Act; while the present case involves the tax of 1886, which accrued prior to the passage of the Hewitt Act. And the point upon which this court decided the case involving the tax of 1887, was that the Hewitt Act by its terms repealed all exemptions from taxation, including the exemption of the Louisville Water Company; and that the legislature had the lawful power to make the repeal; so that there was therefore no ground for the company's refusal to pay the tax of 1887. That question of course does not arise in the present case, because, as just explained, the tax now involved accrued prior to the passage of the Hewitt Act, and that act did not purport to be retrospective in the effect of its repealing clause. But the Court of Appeals, following one of its own previous decisions, held that the original act of exemption was unconstitutional and void.

Defendants in error have moved to dismiss the writ of error for want of jurisdiction in this court, and have coupled with that motion a further motion to affirm as a delay case.

The Water Company attempted to make a federal question by its answer in the State court as follows: After having stated with great detail the passage of the exempting Statute of April 22, 1882, and the Company's acceptance thereof, and performance of obligations thereunder, and etc., it then made the following statement:

"And this defendant further answering, says that the alleged and pretended assessment set up and asserted in the petition in this action have for their authority an act of the General Assembly of the Commonwealth of Kentucky, approved upon the 17th day of May 1886, and entitled an Act to amend the revenue laws of the Commonwealth of Kentucky, and said pretended assessment and levy asserted and set up in the petition, and sought to be enforced herein has no other countenance or authority than the said Act hereinbefore referred to as approved the 17th day of May 1886.

"And the defendant says that the said Act of May 17, 1886, furnishes the only authority for the pretended and alleged assessment and levy set up and asserted in the petition in this action.

"And this defendant relying upon its said contract as herein before set out, and as evidenced by the act hereinbefore referred to as approved on the 22nd day of April 1882, avers and says that in so far as the said act approved on the 17th day of May 1886, seeks to authorize, justify or countenance an assessment of, or levy of a taxation upon the property of this defendant that said act approved May 17, 1886 is in violation of the constitution of the United States for the reason that the same impairs the obligation of the contract of the Commonwealth of Kentucky hereinbefore set out by the act hereinbefore referred to as approved April 22, 1882." (Record 11.)

ARGUMENT ON MOTION TO DISMISS.

By the allegations of the answer just quoted, the defendant Company has made an attempt to raise a federal question on the record. As said by this Court in Hamblin vs. Western Land Company, 147 U. S., 532, "A real, and not a fictitious, federal question, is essential to the jurisdiction of this Court over the judgments of State courts." Let us then look carefully at the question attempted to be stated in this answer.

As to the allegation that the Act of May 17, 1886, furnishes the only authority for the "*levy*" of the *tax* (as distinguished from the *assessment* of the *property*) the allegation is not true, as the record and the acts above referred to plainly show. The act of May 17, 1886, does not attempt to make a levy of taxes for any time preceding the taking effect of the act. The levy of taxes for such antecedent time was provided for by other acts, the rate of taxation being fixed by them; and the act of May 17, 1886,

simply provided that nothing therein contained should operate as a repeal of any obligations or penalties incurred under any existing law; (Article 12, Section 7, Appendix I.), and although it was insisted in the Court of Appeals by plaintiff in error that this Act had discharged all pre-existing obligation (if any there was) to pay this tax, levied as of January 10, 1886, yet the Court in its opinion denied the truth of this proposition, simply calling attention, with reference to the act, to the fact that "it expressly excepted all obligations incurred under existing laws from repeal," and saying, "It is, therefore, clear that if appellant had become liable for the tax of 1886, the act *supra* did not release it from such liability." (Record 27). And while the Court says it does not agree with appellant that the act is only prospective, yet it is plain that the Court there refers to the matter of going back and *assessing* property which had been ommitted in the preceding years, and not to the matter of levying a tax for preceding years; for the amount of tax for which judgment was given was, as heretofore stated, according to the rate in force for the year 1886, prior to the adoption of the act of May 17, 1886, viz.: 51½ cents on the $100; whereas, the rate fixed by the said act of 1886 was 47 cents upon the $100, and the rate in force in 1891, when the assessment was actually made, was 42 cents on the $100. We repeat, therefore, that the statement in the answer, to the effect that the act of May 17, 1886, furnishes the only authority for the levy of the tax asserted in the petition, is plainly not true; and no such authority was asserted or found, either by the Commonwealth as plaintiff in the action, or by the Court of Appeals in sustaining the tax.

Let us consider, then, the other allegation, to-wit, that this act of May 17, 1886, furnishes the only authority for the assessment of the property set up in the petition; and let us see what is the effect of this allegation, if true, in the matter of raising a federal question. It is true that this act provided that the Sheriff should report for assessment any property which had been omitted, and that the Court construed this to apply to years preceding the adoption of the act, as well as to succeeding years. This resulted simply from the fact that the act of May 17, 1886, was a general law intended to cover the whole subject of revenue and taxation, intended to make a complete law for the State upon that subject; and unless the State was willing to release all obligations to pay taxes which had theretofore been levied upon property, which had been omitted from the assessment rolls by the officers whose duty it was to report the same, it was necessary in adopting this new general law to make provision for assessing this previously omitted property. There had been a similar provision in the preceding general law, as it had existed since 1873 (long prior to the adoption of the exemption statute of 1882), for which the Act of May 17, 1886, was intended as a substitute; this provision for the reporting of property by the Sheriff being substantially a mere repetition of a

similar provision in the preceding law. The similarity of the two provisions may be seen by placing the same in parallel columns, italicizing certain words in the new law which are not found in the old. The preceding law referred to is in the General Statutes, chapter 92 (adopted in 1873), and the particular provision mentioned is found in Article 8, Section 23. The provisions in the two acts are as follows:

GENERAL STATUTES, CH. 92, ART. 8, SEC. 23.	ACT OF MAY 17, 1886, ART. 6, SEC. 25.
It shall be the duty of the Sheriff to report to the County Clerk all lists of property omitted by the Assessor, who shall enter the same on the Assessor's books for his county, and certify the same to the Auditor on or before the last day of December in each year; and the said Sheriff shall have for his compensation for said assessment twenty five cents, and in addition to the fee, twenty-five per cent of the taxes realized on said assessment.	It shall be the duty of the Sheriff to report to the County Clerk all lists, or part of lists, of property *which may for any year or years have been* omitted by the Assessor, *and all property which corporations may have omitted for any year or years to have listed with the Auditor*, and said Clerk shall enter the same on the Assessor's book for his county, and certify the same to the Auditor on or before the last day of January in each year; and the said Sheriff shall have, as compensation for said assessment, twenty-five cents, and, in addition to the fee, twenty-five per cent on the taxes realized on said assessment. But this section does not include property erroneously described by the Assessor.

It will be observed that the act of May 17, 1886, adds the words—not found in the original—"which may for any year or years have been," &c. This was only intended to make it entirely plain that the sheriff should have the power under this section to report omitted property, not only for the current year, but for preceding years. But exactly this same construction had been put upon the preceding law found in the General Statutes. In the case of Barbour vs. the Louisville Board of Trade, 82 Ky., 645, the sheriff in May, 1884, had reported property as omitted from the assessment rolls in the years 1880, 1881, 1882 and 1883; and in a suit brought to enjoin the collection of taxes based on this assessment the point was expressly made by the counsel for the Board of Trade, as appears in the points of counsel as reported (page 646), that the sheriff had no right to report property for "back taxes." And while the court in its opinion does not expressly refer to this point, yet it upheld the assessment and directed that the injunction which had been granted by the lower court should be dissolved and the petition dismissed.

Again it may be observed that the Act of May, 1886, contains the words (not in the General Statutes), "and all property which corporations may have omitted for any year or years to have listed with the Auditor." While these words were not in the General Statutes as originally adopted, and as quoted above, yet they were substantially embodied in an act approved April 22, 1884, by which the mode of assessing the property of corporations was changed; it being at the same time provided that Section 23 of Article 8 of the General Statutes as above quoted, as to the report of omitted property by the Sheriff, should be applicable to corporations which should fail to report their property for taxation. (Appendix III.)

We repeat therefore, that the provision in the act of May 17, 1886, authorizing and directing the Sheriff to report for assessment any property which had been omitted for preceding years, was simply a substantial re-enactment of a similar provision contained in the immediately preceding general law on this same subject of revenue and taxation; and while it is true that the act of May 17, 1886, governed the sheriff in making the assessment involved in the case at bar, yet the same duty would have rested upon him under the preceding law, if the Act of May 17, 1886, or the Act of April 22, 1884 (which later act, however, is not relied on as impairing the obligation of the contract), had never been passed, and he had continued to act under the law as it existed prior to the passage of the exemption Statute of April 22, 1882, relied on by plaintiff in error as a contract.

But, suppose for the sake of argument, we are wrong in saying that the provision in the Act of May 17, 1886, directing the sheriff to report omitted property, is the same in substance as the act which existed prior to the passage of the exemption statute of 1882, upon which plaintiff in error relies as a contract. Still we insist that no federal question is raised by the action of the sheriff in assessing the property of the Louisville Water Company, or by the action of the Court of Appeals of Kentucky in upholding this proceeding on the part of the sheriff. We have already shown that the tax in question was not levied under the Act of May 17, 1886, upon which plaintiff in error relies as impairing the obligation of the contract contained in the act of April 22, 1882. That tax had been imposed by pre-existing law. The act of May 17, 1886, did not purport to repeal the act of exemption of April 22, 1882, upon which plaintiff in error relies as a contract, so far as the time *preceding* May 17, 1886, was concerned. It did purport to repeal this exemption, with all other similar exemptions, for the time *succeeding* the passage of the latter Act; and to the extent that it did purport to make this repeal this court has upheld it as a valid exercise of legislative power. (Louisville Water Company vs. Clark, 143 U. S. 1). But, as just stated, as to the period preceding the adoption of the act it made no attempt to repeal the

exemption; and therefore had no effect upon it one way or the other. It did not refer to it at all.

Clearly, therefore, it cannot be said that the act of May 17, 1886, impaired the obligation of the alleged contract contained in the act of April 22, 1882. It is impossible to understand how it can be said that a legislative act has impaired the obligation of a contract contained in a preceding statute when it makes no reference to the same, either expressly or by implication, either in general or specific terms.

But, as heretofore explained, the act of May 17, 1886, was a general revenue statute, and among other things it provided generally for the assessment by the Sheriff of any property liable to taxation for preceding years, but which had been improperly omitted from the assessment books. It made no attempt whatever to alter the pre-existing laws which had provided what property should be liable to taxation. It did not purport to affect that question in any manner; and it did not, in fact, do so. It only provided in general terms for the assessment, by a proper officer, of property which had been liable and was liable to taxation under the pre-existing laws, but which had been improperly omitted. This was all that was done by the legislative department of the State.

But the Sheriff, a ministerial officer, conceived that the property of the Louisville Water Company was liable for taxation under the laws as they existed prior to May 17, 1886. He conceived that the Act of April 22, 1882, purporting to exempt the property of the Louisville Water Company from taxation, was unconstitutional, and therefore that that property was and always had been subject to taxation by the State; and that, as it had not been assessed, and as no taxes had been paid upon it since April 22, 1882, it ought to be reported and assessed for taxation. And accordingly he did assess the same, and a suit was brought in the name of the Commonwealth and of the Sheriff jointly, against the Water Company, to recover the amount of the tax based on this assessment for the year 1886. And the lower court having given judgment in favor of the plaintiffs for the amount of the tax, the Court of Appeals affirmed that judgment.

If any wrong has been done the Louisville Water Company in disregard of its alleged contract contained in the Act of April 22, 1882, it has been done by the Sheriff, the ministerial officer, and by the Judges of the courts, being the judicial officers, of the State. *There has been absolutely no attempt on the part of the legislative department of the State to interfere with this alleged contract.* Such being the case, no federal question is presented.

It can not be said that the validity of the Statute of May 17, 1886, is in any sense drawn in question. As to the right of the Legislature of a State to direct that property liable to taxation under pre-existing laws, but which had been omitted from the

assessment books by accident or otherwise, should be assessed so that the taxes might be collected upon the same, this can not be doubted; and to deny this right, and in that way attempt to raise a Federal question, is to do exactly what this Court in the case already cited said could not be done. "The bare averment of a Federal question is not in all cases sufficient. It must not be wholly without foundation." (Hamblin vs. Western Land Company, 147 U. S. 532.)

It may be said, however, that the action of the Sheriff in assessing this property for taxation, upon the idea that the exempting Statute was unconstitutional, supported and maintained by the decision of the Court of Appeals, was, "an authority exercised under the State," and that this has been drawn in question on the ground of being repugnant to the constitution of the United States; and that as the decision of the State court was in favor of the validity of such authority, therefore a Federal question is presented.

But this manifestly can not be true. Of course every ministerial officer acts only by virtue of an authority under the State. And so every judicial officer acts only by virtue of an authority under the State. And this authority is always conferred by legislative action, either in the form of a constitution or statute; and this may be a new constitution or a new revision of the laws, adopted after the passage of some act which is claimed to constitute a contract. Thus the Court of Appeals which gave judgment for this tax was a court created by a constitution adopted in 1891, long after the passage of the exemption statute of 1882. And it may be said that the only authority for the existence of the court or of the sheriff who made the assessment, was the constitution of 1891; though it did not affect the question of defendant's liability, or exemption from liability to taxation. Yet it is perfectly evident, and this court has often so held, that the fact that a party complains of the action of a ministerial officer or of a court as being in violation of a contract right, does not raise a Federal question. The mere action of a ministerial officer, or a judicial officer, *under a statute which is itself valid*, will not be sufficient to raise such a question.

In New Orleans Water Works vs. Louisiana Sugar Company, 125 U. S., 30, this court said:

"In order to come within the provisions of the Constitution of the United States, which declares that no State shall pass any law impairing the obligation of contracts, not only must the obligation of a contract have been impaired, but it must have been impaired by a law of the State. The prohibition is aimed at the legislative power of the State, and not at the decisions of its courts, or the acts of administrative or executive boards or officers, or the doings of corporations or individuals."

The court conceded in the case just cited that legislative authority might be exerted otherwise than by the immediate action of the legislature of the State. Thus, that the legislature might authorize a municipal council to exercise certain legislative functions, as, for example, in the levying of municipal taxes; and that where this should be the case, the action of the council in making such a levy would be regarded as the enactment of a law by the State. It also recognized the fact that the enactment of what purported to be laws by the Confederate Government, and which were given the effect of laws in the several States of the Confederacy, were enactments of laws within the meaning of the Federal Constitution. But, while the case then immediately before the court was one in which a municipal ordinance of the city of New Orleans was attacked as being in contravention of an alleged contract right, yet the court said that the action of the City Council in the matter complained of was *not legislative in its character*, but was entirely ministerial, and therefore no federal question was thereby presented. In that case a legislative act of the State of Louisiana had granted to the New Orleans Water Works the exclusive right to furnish water to the city of New Orleans, providing however that nothing therein should "be so construed as to prevent the City Council from granting to any person or persons contiguous to the river the privilege of laying pipes to the river exclusively for his or their own use." Subsequently the City Council, by the ordinance complained of, did grant to the Louisiana Sugar Company the right to lay pipes to the river for its own use, it being contended that the property of this company was "contiguous to the river." It was insisted by the Water Company that this property was not contiguous to the river; and that therefore this ordinance was in violation of the contract between the Water Company and the State as contained in the legislative act referred to. But this court held that the City Council, although exercising authority under the State (for all municipal councils do this), and although acting by virtue of the authority granted to it by the legislative act which had created the contract, yet did nothing more than determine for itself that this property of the Sugar Company did lie contiguous to the river; and that, as this was *a purely ministerial action, and in no sense legislative in its character*, therefore, although the action was taken by a body which in many respects had legislative powers, yet the action complained of was not a legislative action, and therefore raised no federal question.

So in the case at bar. So far as the legislative act of May 17, 1886, is concerned it certainly attempted to do nothing except what the legislature had power to do, viz, to direct its officers to assess any property which had been liable to taxation under pre-existing laws, but which had been improperly omitted from the assessment books. And the action of the Sheriff in determining

for himself that the property of the Louisville Water Company was liable to taxation, under the law as it existed prior to May 17, 1886, and the action of the courts in upholding this action on the part of the Sheriff, were of course not legislative acts in any sense of the word, and therefore do not present any federal question.

We suppose the principle to which we have referred, to wit, the necessity for *legislative* action by the State in order to raise a federal question based on contract rights, is so thoroughly understood as not to need an extensive citation of authorities. We may however, refer to a very late case on the same subject in Central Land Company vs. Laidley, 159 U. S. 109, where this court said:

"In order to come within the provision of the constitution of the United States, which declares that no State shall pass any law impairing the abligations of contracts, not only must the obligation of a contract have been impaired, but it must have been impaired by some act of the legislative power of the State, and not by a decision of its judicial department only."

As to that provision of the judiciary act which confers authority upon this Court, where there is drawn in question the validity "of an authority exercised under a State," as being repugnant to the Constitution, laws or treaties of the United States, it must be remembered that, generally speaking, some instances of authority exercised under a State, in the various phases of social life and action, might be asserted to be repugnant to various provisions of the Constitution, laws or treaties of the United States; but in attempting to present a federal question in a given case it is necessary to show what provision of the Constitution the authority in the specific case is repugnant to; and when the *contract clause* of the Federal Constitution is pointed out as the provision to which the authority is repugnant, we find that that clause only protects against legislative authority. In other words, speaking with reference to the general language of the judiciary act, we mean to present the idea, that one may conceive that some case might arise in which a ministerial action might be justly claimed to be in violation of some right protected by the Constitution, laws or treaties of the United States; but when the right thus sought to be protected is a contract right, then we know that the only clause in the Constitution of the United States on the subject of protection of contract rights is that clause which provides in substance that no State shall pass any law imparing the obligation of a contract; and this clause of the Constitution has been held, as heretofore shown, to protect contract rights only against the legislative power of the States, and not against ministerial or judicial power or authority.

We, therefore, respectfully ask that the writ of error be dismissed for want of jurisdiction.

ARGUMENT ON MOTION TO AFFIRM.

If, however, this court should take jurisdiction of the action, we submit that the motion to affirm as a delay case should be sustained. The act of April 22, 1882, exempting the property of the Louisville Water Company from taxation was manifestly not a contract, either in substance or in form, and hence there is no ground upon which this court can reverse the judgment of the Court of Appeals of Kentucky.

The answer of plaintiff in error alleges that "it is a private corporation, and that all of its capital stock is now, and has at all times since the 3d day of March, 1870, been owned, held and possessed by the Board of Commissioners of the Sinking Fund of the City of Louisville." (Record 7.) And the act of exemption shows that it was not intended to be a contract, but was simply an attempt on the part of the legislature to exempt the property of the Louisville Water Company on account of the fact that it was in effect property of the City of Louisville, and ought therefore to be exempt from taxation as *public property*. The Act of exemption in its entirety reads as follows:

1. "That it shall be the duty of the Louisville Water Company to furnish water to the public fire cisterns and public fire plugs or hydrants of the City of Louisville for fire protection free of charge.

2. "The Sinking Fund of the City of Louisville being the owner of the stock of the Louisville Water Company, and said Water Company by virtue thereof is the property of the City of Louisville, *therefore* the Louisville Water Company is hereby exempted from the payment of taxes of all kinds of whatever character, State, municipal and special." (our italics) (2 Acts 1881, p. 915.)

The Court of Appeals in the present case gave no reason for its decision to the effect that this Act was unconstitutional; it simply referred to its former decision in Clark vs. Louisville Water Company, 90 Ky, 515, to establish that proposition. Referring then to the opinion of the court in that case, we see the view which it took of this exempting statute and which we submit is manifestly correct. In its opinion in that case the court said:

"We think it evident that the furnishing of water by the Company to the city for fire protection free of charge was not what induced the passage of the act. Its recitals, aside from the express statement in it of the reason, make this quite plain. It says: 'The sinking fund of the city of Louisville being *the owner of the stock of the Louisville Water Company, and said Water Company, by virtue thereof, is the property of the city of Louisville; therefore* the Louisville Water Company is hereby exempted from

the payment of taxes of all kinds of whatever character, State, municipal and special.'

"According to the legislative recital, the sinking fund of the city owns the entire stock of the Water Company. There is nothing in the record showing otherwise, and it must therefore be assumed to be true." (In the answer in the present action this is expressly averred to be true.) "While the sinking fund department is a separate corporation from that of the city proper, yet it is merely the money-making branch of the municipal government. It has charge of its funds and its investments, whether in bank, railroad, water company stocks, or other valuable and money-making securities.

"We see, therefore, that the property and rights of the Water Company belong to the city. While, therefore, the act recites that it shall be the duty of the Water Company to furnish water to the public fire cisterns and public fire-plugs or hydrants of the city for fire protection, yet this could not have been the consideration that induced the passage of the act, since it made no difference to the city whether a million of dollars or a penny might be paid for this service, because it was the owner of the rights and property of the Water Company, and it would, therefore, be but a payment to *itself*. It can not be supposed, therefore, that the legislature intended to relinquish over $10,000 of taxes annually in consideration that the city would not charge *itself* for water furnished by *itself*.

"It is useless to inquire why the act declares that the Water Company should furnish water to the city free of charge. Perhaps, as suggested by counsel, it was merely to avoid the trouble of keeping an account between the sinking fund department and the city proper. The reason which induced the attempted granting of the exemption must, therefore, have been, as indeed the act recites, that the sinking fund of the city, or, in other words, the city itself, owned all of the Water Company stock." (Court's italics.)

Such was the view of this Act of exemption taken by the Court of Appeals, and it was manifestly the correct one. The theory of counsel for plaintiff in error, upon which they seek to make a contract between the Water Company and the State is, that the State, recognizing its duty to furnish water to the city of Louisville as being a proper governmental function of the State, contracted with the Louisville Water Company to perform this duty for the State as the agent of the State, and agreed to pay it for the service by exempting its property from all kinds of taxation. But a consideration of the relations of the several parties to this supposed contract, and the very recitals in the act itself, show that the State had no such purpose in view. It simply regarded this property as the property of the city of Louisville, and considered that it should be exempted from taxation as *public property;* and fur-

thermore considered that it was useless for one department of the city to continue to pay money into another department of the city for services rendered by the city to itself; and hence it directed that such charges and payments should thereafter cease. The assets of the sinking fund, which is a mere department of the city government, being exempted from taxation by this Act, and being thus largely increased in value, the legislature doubtless felt that, as a means of equalizing the general funds of the city with the sinking fund of the city, it was proper to stop the payments from the general fund to the sinking fund; thus making compensation to the general fund for the large benefit granted to the sinking fund by the exemption of this property from taxation.

As heretofore said, this was evidently not intended by the legislature to be a contract with the Water Company to pay it for the performance of public services, but was simply an attempt to exempt this property from taxation on the ground that it was *public property*. And on the question of whether or not this was a valid ground of exemption from taxation under the Constitution of Kentucky, the Court of Appeals held that it was not. And its judgment upon that question of State law this Court has no power to revise.

It may be suggested that the creditors of the City of Louisville, those whose debts are chargeable upon the Sinking Fund, have an interest in the assets of the Sinking Fund (of which the stock in the Louisville Water Company is a part), and that their rights are impaired by the taxing of this property, contrary to the provisions of the act of exemption. But no creditors of the City of Louisville are complaining of this taxation; neither is the Sinking Fund of the City of Louisville complaining for them. No one is making any complaint except the Louisville Water Company. But certainly if the creditors do not complain, and the Sinking Fund does not complain, of any violation of the rights of these creditors, the Louisville Water Company has no right to raise the question for them. It has no interest in the question of whether the debts of these creditors of the City of Louisville are or are not paid. And, furthermore, if it were necessary to consult these creditors as to whether or not the State should tax this property of the Water Company, it would have been necessary to consult them and get their consent to the passage of the act of exemption of April 22, 1882, when (according to the construction of the plaintiff in error) the right to charge the City of Louisville for water furnished it by the Water Company was traded off for an exemption from taxation. Yet there is no suggestion that they were consulted about that Act. While there is a statement that the Water Company accepted that act, there is no statement that the creditors of the Sinking Fund ever did so. It is plain, therefore, that the creditors of the Sinking Fund have no interest in this controversy, and are not asserting any.

We submit, therefore, that the Act of April 22, 1882, was not a contract either in substance or in form, but was merely an attempt to exempt property from taxation on the idea that it was *public property;* and that the decision of the Court of Appeals of Kentucky to the effect that such exemption was not permissible under the laws of Kentucky, is not a decision which this court can revise; and therefore that the motion to affirm as a delay case, if this court takes jurisdiction of the controversy at all, should be sustained.

JAMES P. HELM,
HELM BRUCE,
Counsel for Defendants in Error.

December 1, 1896.

APPENDIX.

I.

HEWITT ACT OF MAY 17, 1886 (1 ACTS 1885–6, PAGE 140).

Article 1, Section 1: "That an annual tax of forty-seven cents upon each one hundred dollars of value of all real and personal estate directed to be assessed for taxation, due and payable the fiscal year assessed, shall be paid by the owner or person assessed."

Art. 12, Sec. 7: "That this Act shall take effect from and after September 14, 1886; but it shall not operate as a repeal of existing laws as to any assessment made, licenses granted, or obligations or penalties incurred under any existing law."

II.

ACT OF MAY 22, 1890 (1 ACTS 1889–90, PAGE 158).

SECTION 1. "That section one of article one of an Act, entitled "An Act to amend the revenue laws of the Commonwealth of Kentucky," approved May seventeenth, one thousand eight hundred and eighty-six, be, and the same is hereby, amended so as to substitute for the word "forty-seven," in the first line, the word "forty-two," and for the word "twenty," in the seventh line, the word "fifteen."

Sec. 2. This Act shall take effect from and after its passage."

Became a law, the objections of the Governor to the contrary notwithstanding, May 22, 1890."

III.

ACT OF APRIL 22, 1884 (1 ACTS 1883-4, PAGE 70).

Sec. 1. "That hereafter all corporations in this Commonwealth, except railroad and turnpike companies, shall, in the manner provided by article twelve, chapter ninety-two, of the General Statutes, list their property with the assessor of the county in which the corporate property is situated."

Sec. 4. "Sections twenty-three and twenty-four, of article eight, of chapter ninety-two, of the General Statutes, are hereby made applicable to all cases where any corporations may have heretofore failed, for any year or years, to list its property with the Auditor as now required, or may hereafter fail to list its property with the assessor as herein provided."

No. 179.

Brief of Burnett for P. C. Co.

Supreme Court, U. S.
FILED
JAN 16 1897
J. H. McKENNEY
CLERK.

Filed Jan. 16, 1897.

SUPREME COURT OF THE UNITED STATES.

October Term, 1896.

No. ~~585~~ 179.

THE LOUISVILLE WATER COMPANY, . . Plaintiff in Error,

VERSUS

THE COMMONWEALTH OF KENTUCKY, . Defendant in Error.

IN ERROR TO THE COURT OF APPEALS OF THE STATE OF KENTUCKY.

BRIEF FOR THE PLAINTIFF IN ERROR ON MOTION OF DEFENDANT TO DISMISS OR AFFIRM.

PRINTED BY THE BRADLEY & GILBERT COMPANY.

SUPREME COURT OF THE UNITED STATES

LOUISVILLE WATER COMPANY, . PLAINTIFF IN ERROR,

vs.

THE COMMONWEALTH OF KENTUCKY, ... } DEFENDANT IN ERROR.

The motion of defendant in error to dismiss or affirm rests upon the hypothesis that the act of the 22d of April, 1882, did not constitute a contract between the plaintiff and defendant in error. The act of the 22d of April, 1882, amending the charter of the Water Company and exempting it from the payment of taxes of all kinds, State, municipal, and special, provided:

> "1. It shall be the duty of the Louisville Water Company to furnish water to the public fire cisterns and public fire plugs or hydrants of the city of Louisville for fire protection free of charge.
>
> "2. The Sinking Fund of the city of Louisville being the owner of the stock of the Louisville Water Company, and said water company by virtue thereof is the property of the city of Louisville, therefore the Louisville Water Company is hereby exempt from the payment of taxes of all kinds, of whatever character, State, muncipal, or special. This act shall take effect from and after its passage." 1 Sess. Acts, 1882, p. 915.

The construction of this act was before this Honorable Court in the case of the Louisville Water Company, plaintiff in error, against William Clark, sheriff of Jefferson County, defendant in error, reported in 143 U. S., page 1. Opinion of the Court by Justice Harlan.

In that case the then Chief Justice of the Court of Appeals of Kentucky, having refused a writ of error, on the 15th day of December, 1890, a motion was made in open court for a writ of error in that case to the Court of Appeals of Kentucky, and on the 5th day of January, 1891, the following order was made by this court:

> "Supreme Court of the United States, October Term, 1890. *Ex parte:* In the matter of the Louisville Water Company, petitioner. On petition for a writ of error.
>
> "It is ordered by the court that counsel be given until the third Monday in January, instant, to file printed briefs upon the question of the existence of the contract, the impairment of which is claimed to justify the issuance of the writ applied for.
>
> "January 5, 1891."

And in that case, on the 26th of January, 1891, the following order was made:

> "Supreme Court of the United States, October Term, 1890. *Ex parte:* In the matter of the Louisville Water Company, petitioner. On petition for a writ of error.
>
> "On consideration of the petition for a writ of error herein, and of the argument of counsel thereupon had, as well in support of as against the same, it is now here ordered by the court that said petition be, and the same is hereby, granted."
>
> "January 26, 1891."

See record and case, 143 U. S., page 1.

The act of 22d of April, 1882, was accepted by the Water Company, and from its date to the 15th of September, 1886, the day on which the act known as chapter 92, General Statutes of Kentucky, took effect, did furnish an abundant supply of water to the public fire cisterns and public fire plugs and hydrants of the city of Louisville for fire protection free of charge. (See Record, pages 10 and 21.)

The charter of the Louisville Water Company was approved March 6th, 1854, being an act to incorporate the Louisville Water Company, see second volume of Acts Kentucky Legislature, 1853–54, page 121, the sixth section of which provides, among other things:

"In the laying and constructing of pipes and aqueducts in the city of Louisville the same shall be so laid and constructed that an abundant supply of water can be drawn therefrom for the extinguishment of fires, and said corporation shall furnish water to the city of Louisville for the extinguishment of fires and cleaning streets upon such terms as may be agreed upon between it and the authorities of said city."

After the act of 22d April, 1882, and in accordance therewith, an abundant supply of water for all such purposes was furnished by the Water Company free of charge down to and including the year 1886. The charter of the plaintiff in error and all amendments thereto, and all the revenue laws of the State of Kentucky, including the revenue act of May 17th, 1886, being chapter 92 of the General Statutes, Edition of 1887, were reviewed by this Honorable Court in the case of the Louisville Water Company against Clark, sheriff, 143 U. S. Reports, page 1. In that case (which involved only taxes for the year 1887) it was determined that the act approved February 14th, 1856, entitled "An act reserving power to amend and repeal charters and other laws," should be read as a part of the act of 22d of April, 1882, and that under this reserved power the State could repeal the exemption from taxation by the passage of the revenue law approved the 17th of May, but which, by its terms, took effect the 15th of September, 1886, and used this language:

"In determining the object and scope of the act of 1882, we must look at all of its provisions. The Water Company was under a duty by its charter, passed before the act of 1856, to furnish water for the extinguishment of fires and the cleansing of streets, not free of charge, but upon such terms as might be agreed upon by it and the city. And the legislature certainly did not assume to impose upon it the obligation to furnish water, for fire protection, free of charge except in connection with the grant to it of immunity from taxation. Accepting, however, the benefits of this exemption from taxation, it became bound to supply water for public purposes free of charge. But that obligation remained only so long as the exemption continued in force. The act of 1882 is to be regarded as an entirety, and meant nothing more than that the company

should furnish water for fire protection, free of charge, so long as the immunity from taxation continued. This view is in harmony with the act of 1856, which expressly declares that whilst privileges and franchises granted to corporations, after its passage, could be changed or repealed, no amendment or repeal should impair other rights previously vested. The effect of the withdrawal of the immunity from taxation was, therefore, to leave the Water Company in the position it was before the passage of the act of 1882 in respect to its right to charge for water furnished for public fire cisterns, fire plugs, or hydrants."

We therefore conclude that there was a contract created by the act of 1882, and that it existed from that date until under the provisions of the act of 1856, read in connection with said act, it was repealed by the revenue act approved the 17th of May, 1886, and, that as the obligation to furnish water for fire protection free of charge continued from the 22d of April, 1882, to the date of the revenue act of 1886, approved the 17th of May, and took effect the 15th or September, it must follow that the exemption from taxation continued for the same period. It follows that an attempt to collect the tax for the year 1886 is an attempt to destroy rights previously vested by the obligation of the contract. If the conclusion is right that this exemption from taxation was withdrawn by the revenue act of 1886, any attempt to collect from the plaintiff in error taxes upon its property between the 22d of April, 1882, and the 17th of September, 1886, whether by virtue of the law of 1886, or any law subsequent thereto, violates the plaintiff's right of protection under its contract.

The taxes under consideration in this case are for the fiscal year of the State of Kentucky ending June 30th, 1886, General Statutes, page 652, Edition of 1887 (see Appendix 1), a year covered by the period during which the contract of exemption as set out in the act of April 22d, 1882, was in full force, and our next step in the development of this case is to determine when the statute was passed under the authority of which the taxes in question were assessed and levied and the action for their recovery instituted and prosecuted to a judgment. The act of April 22d, 1882, was in conflict with section 1, article 1, and section 23, article 8, of chapter 92, General Statutes, Edition of 1873, and effected the repeal of every statute in the State of Kentucky fixing

a rate of taxation or levying or imposing a tax upon the plaintiff in error or its property.

By section 22, chapter 21, General Statutes (See Appendix 1), Edition of 1873, in force on the 22d day of April, 1882, and thereafter and now in force, it was enacted that "when a law which may have repealed another shall be repealed, the previous law shall not be revived unless the law repealing it be passed during the same session of the General Assembly."

If the act of April 22, 1882, gave to the plaintiff in error the benefits of the exemption and immunities therein provided for, it is clear that to that extent the act of April 22d, 1882, effected a repeal of the Revenue Laws of the State of Kentucky in so far as they authorized, suffered, or permitted the fixing of a rate of taxation or the levying or the imposition of a tax upon the plaintiff in error or its property, or the assessment of the plaintiff in error or its property for taxation by the State, or the collection from the plaintiff in error by coercive measures of any tax imposed by the State. This court takes judicial notice of the fact that the General Assembly of the Commonwealth of Kentucky never did re-enact the Revenue Laws, repealed by the act of April 22d, 1882, so far as the plaintiff in error and its property were concerned, in direct terms, and that the only re-enactment of such laws was by indirection, and is found in section 25, article 6, of the act approved May 17th, 1886, which provides that: "It shall be the duty of the sheriff to report to the county clerk all lists or parts of lists of property which may for any year or years have been omitted by the assessor, and all property which corporations may have omitted for any year or years to have listed with the auditor, and said clerk shall enter the same on the assessor's book for his county, and certify the same to the auditor on or before the last day of January in each year."

It is the contention of the plaintiff in error in this case that in so far as said section and article authorizes an assessment of its property or the imposition of a tax upon it for the year 1886, in which year its property was omitted by the assessor, and in which year it omitted to list its property with the auditor, impairs the obligation of the contract set out in the act of the 22d of April, 1882.

As will be seen, section 25, article 5, of the act of May 17th, 1886 (Appendix 1), undertakes to put into force and to revise, so far as the plaintiff in error and its property is concerned during

the period of time the act of April 22d, 1882, was in force, all the revenue law and provisions of the revenue laws that were repealed, in so far as the plainriff in error and its properties were concerned, by the act of April 22, 1882.

The contention of the defendant in error that the act approved April 22d, 1884, entitled: "An act to amend the revenue laws," vol. 1, page 70–71, Sess. Acts of 1883–84, was an authority for the assessment, imposition, or collection of the taxes under consideration in this case, is founded on a misconception of the act itself, as will be seen from section 5 of that act, which in express terms provides that "this act shall not apply to any tax payable by any corporation on its corporate stock, but only to cases where an ad valorem tax is levied." (Appendix 2). The act discloses that there is no express repeal in it of the act of April 22d, 1882, or any reference in it to the act of April 22d, 1882, other than in this language, "that this act shall apply only to cases where an ad valorem tax is levied." Now, on the 22d day of April, 1884, no ad valorem tax was levied by the State on the plaintiff in error or its property, and it is expressly set out in the act of the 22d of April, 1884, that it was not to apply in a case where no ad valorem tax was levied.

By section 6 of the act approved April 22d, 1884, it is provided "that all laws and parts of laws inconsistent herewith are hereby repealed." Now, as the act of April 22d, 1882, is not irreconcilable with or repugnant to any provision contained in the act of April 22d, 1884, as both acts can be enforced in the same territory at the same time, and full effect given to each, it is perfectly clear that the act of April 22d, 1884, furnishes no authority for the imposition, assessment, or collection of the tax under consideration in this case. It is clear that unless the act of April 22, 1884, operated as a repeal of the act of April 22d, 1882, that it furnished no authority for the imposition of any tax on the plaintiff in error or its properties, or the assessment of the plaintiff in error or its properties, for taxation by the State.

Not only was there no authority given by the act approved April 22d, 1884, for the imposition, assessment, and collection of the taxes under consideration in this case, but the act itself was repealed by the act approved May 17th, 1886, that went into effect on September 15th, 1886.

In the case of the Commonwealth *vs.* the Railroad Companies, 95th Ky., pages 68 to 75 inclusive, the Court of Appeals, in deter-

mining the effect of the act aproved May 17th, 1886, upon the act as approved May 22d, 1884, and kindred acts, say:

> "In determining the force and the effect of this latter act on prior legislation, general and special, regulating taxation in the Commonwealth, it is evident that its general purpose and intent should be given much weight. Manifestly the act of 1886 *is intended to compass the reform of the entire revenue law of the State, to constitute in itself a general and complete revenue system.* As argued by counsel, it singles out no special defect here and there, but is aimed broadcast at the whole structure, else why should it have reenacted as it does many old laws in identical and equivalent terms. This general purpose to be made effective and uniform must sweep away a mass of special and class legislation adopted in pursuance of the system theretofore in practice. We notice first that all property, real and personal, shall be assessed for taxation, save that expressly exempted in the act itself. Not content with this, the act proceeds to repeal all acts and parts of acts, general and special, inconsistent with itself or not in conformity to itself." Sunderland on Statutory Construction, sections 154–155–156; Endlich on the Interpretation of Statutes, section 201.

As the act of April 22d, 1884, was inconsistent in many of its provisions with the act of May 17th, 1886, the latter act, on the rules laid down by the Kentucky Court of Appeals, and according to the recognized canons of construction, repealed the act of the 22d of April, 1884. 143 U. S., page 2.

The taxes under consideration in this case were assessed and levied on the 9th day of January, 1891, more than four years and three months after the same went into effect, under authority of section 25, article 6, of the act of May 17th, 1886, more than four years and three months after the act of April 22, 1884, had been repealed by the act of May 17th, 1886. In the opinion delivered by the Kentucky Court of Appeals in this case, it will be found recited in the opinion of that court, page 26 of the record, that:

> "The authority for reporting the tax list to the clerk of the county court is to be found in section 25, article 6, chapter 92 of the General Statutes, commonly called the Hewitt bill. The material part of the section is as follows:

'It shall be the duty of the sheriff to report to the county clerk all lists or parts of lists of property which may for any year or years have been omitted by the assessor, and all property which corporations may have omitted for any year or years to have listed with the auditor, and said clerk shall enter the same on the assessor's books for his county, and certify the same to the auditor on or before the last day of January in each year. The law does not specify how and in what manner or form the report shall be made, and that it appears that the clerk accepted the report and certified the same, as required by law, the report of the sheriff and the certificate of the clerk must be held sufficient for the purposes of this action. . . . . The act of the 17th of May, 1886, before referred to, was, as is well known, a revenue bill, and the object was to increase the revenues, not to decrease them, and it expressly excepted all obligations incurred under existing laws from repeal. It is, therefore, clear that if appellant had become liable for the tax of 1886, the act supra did not release it from such liability, nor can we agree with the appellant that the act supra is only prospective. The evident purpose of the act was to confer power upon the sheriff greater than he had theretofore been invested with, and there is nothing in the act to authorize the conclusion that the power and the duty devolved upon the sheriff had reference only to the future. Such an intent would not have been consistent with the object of the act. Appellant insists that the revenue law of 1892 repealed the act of 1890, which authorized the bringing of such suits as this. We do not concur in the appellant's construction of the act of 1892. We do not think it was the intention of the legislature to repeal the act of 1890."

We thus have the express decision of the Court of Appeals to the effect that section 25, article 6, of the act approved on the 17th of May, 1886, was the authority, and is the authority, for the assessment and imposition of the tax under consideration in this case; so that it is clear that the obligation of the contract as contained and set out in the act of April 22d, 1882, in so far as it secured an exemption against the assessment and imposition of the tax, is violated by this subsequent legislation. But as seen from the opinion of the Court of Appeals, section 25, article 6, of

the act approved May 17th, 1886, was and is supplemented and amended by an act of the General Assembly of the Commonwealth of Kentucky, approved on the 23d day of May, 1890, entitled:

> "'An act to amend the revenue laws of the Commonwealth of Kentucky, giving the State the power to sue for taxes.' Vol. 1, pages 149–150, Sess. Acts 1889–90, and which is in words and figures as follows: 'The right and the power is hereby vested in the Commonwealth to institute and maintain its actions to recover taxes which may heretofore have accrued to the Commonwealth, or which may hereafter accrue, and which cannot be collected by the ordinary methods of distraint and sale. Said suits may be instituted in courts of equity jurisprudence for the purpose of enforcing the State's lien on property which for any reason cannot be sold, and for the purpose of reaching intangible property which cannot otherwise be reached. But no action shall be instituted or maintained under the provisions of this act upon any claim for taxes that have been assessed or might have been assessed more than five years before the commencement of the same.'" (Appendix 2.)

Prior to May 23d, 1890, it had become the settled law of the State of Kentucky that the properties of the defendant in error could not be taken, levied on, or sold by the sheriff or collecting officer to coerce the payment by it of any tax or assessment against it or upon its property, and it had further become the settled law of the State of Kentucky that the State was without power to go into its courts and maintain an action against the plaintiff in error to recover any tax or assessment against the defendant in error or upon its property.

In the case of the Louisville Water Company *vs.* Hamilton, 81 Ky., 522, the Court of Appeals say:

> "This corporation, like a turnpike or railroad, can not be seized or sold by a collecting officer, nor the property necessary for its use, so as to deprive the public of the benefit to be derived from it, unless by legislative authority."

In the case of the Louisville Water Company *vs.* the Commonwealth, 89 Ky., 249, the Court of Appeals say:

"It was held by this court in the case of Baldwin *vs.* Hewitt, auditor, &c., 88 Ky., 673, that taxes could not be recovered by suit in the absence of legislative authority, and there being no statute in this State save as to railroad companies, an action for such a purpose could not be maintained, even in the absence of any other adequate remedy. . . . . And the exercise of the power of taxation is legislative in character, while the collection of taxes when once authorized by the law making power is ministerial. The one is legislative, the other executive; neither is a judicial act, and one department of the government should be careful not to encroach upon the dominions of another. It is true that the judiciary may be called upon by the legislature to enforce the collection of taxes in a judicial way, but it has not done so in this State save as to railroads, where suit has been authorized to recover them, and this exceptional case inferentially says that the remedy can not be resorted to in other cases. . . . . The judiciary should not, in our opinion, merely because of legislative silence as to the collection of a tax, imply to itself a power not inherent in itself, and the exercise of which will not only be confusing as to the powers of the different branches of the government, but likely lead to great abuse. Indeed, in view of the legislation as to taxes owing by railroads, it can not do so. We do not intimate whether in this instance the taxes are or are not owing, but merely decide that for the lack of legislation no action can be maintained looking to their collection. If in such a case the State is likely to lose any of its revenue, the legislature can, by additional legislation in the form of penalties for the non-payment, or by authorizing suit for its recovery, provide against it, and will no doubt do so when in its wisdom it may be proper and necessary."

In the case of the Louisville Water Company *vs.* Clark, &c., 94 Ky., 54, the Court of Appeals say that the reason for the reversal by the Court of Appeals of the judgment of the court of first instance in the case of the Louisville Water Company *vs.* the Commonwealth, 89 Ky., 244, was that the court of first instance had no jurisdiction of the subject-matter of the action.

In the case of Baldwin *vs.* Hewitt, 88 Ky., 682, the Court of Appeals say:

"The same reason which forbids the court to levy a tax forbids it from assuming the power to collect it."

In the case of McLean *vs.* Deposit, 81 Ky., 258, the court say:

"The judiciary has no power to levy taxes or to collect taxes when the officer appointed to collect them refuses to do so, or if no one is appointed to collect the judiciary is powerless to supply the defect. These are all legislative duties, and when the department of government to which these duties are confided neglects to discharge them, neither the judiciary or executive department of the government can execute these powers."

In the case of Merriwether *vs.* Garrett, 102 U. S., 472–573, this court, considering the same subject, say:

"Having the sole power to authorize the tax, it must equally possess the sole power to prescribe the means by which the tax shall be collected and to designate the officers through whom its will shall be enforced."

We thus see that not only were the taxes under consideration in this case assessed and levied under the authority of section 25, article 6, of the act of May 17, 1886, but their collection was provided for by the act of 23d of May, 1890, legislation that went into effect at least four years and six months in one instance and more than eight years in the other instance after the date of the contract relied upon by the plaintiff in error as securing to it the exemption from liablity for the taxes sued for, and hence it does certainly appear that the legislation complained of was subsequent to the date of the contract set up by the plaintiff in error, and it was legislation under which every right claimed by the plaintiff in error as vested in it by the contract of April 22d, 1882, was taken from it by the judgment of the courts of the State of Kentucky, and which furnishes the foundation for the writ of error in this action.

To this action, commenced upon the 9th day of January, 1891, to recover a tax from the plaintiff in error for the fiscal year of the State of Kentucky ending June 30, 1886, imposed and assessed under the authority of section 25, article 6, of the act approved May 17, 1886, and which did not go into effect until the 15th of September, 1886, and to this action thus commenced against it under the authority of an act approved on the 23 day of May,

1890, the plaintiff in error interposes as a defense the exemption from liability sought to be enforced against it in the action, secured to it by the act of April 22d, 1882, and which act was in force up to the 15th of September, 1886, covering the identical period of time for which the alleged taxes were levied. The plaintiff in error asserted in its answer that this contract exemption was protected by the Federal Constitution against any impairment of its obligation by the subsequent legislation of Kentucky authorizing the imposition and the assessment of the taxes in question and the action or suit against it for their recovery. This contention of the plaintiff in error was met by a decision of the court of first instance, and by the court of last resort in the State of Kentucky, that the act of April 22, 1882, did not constitute a contract between the State of Kentucky and the Louisville Water Company, that it was not supported by any valuable consideration or public service, and did not secure the immunity from taxation as contended for by the plaintiff in error, and hence the Federal question that gives to this court jurisdiction is whether or not it is with this court or the courts of Kentucky to determine whether the act of April 22, 1882, constitutes a contract, the obligations of which are protected by the Federal Constitution from impairment by said legislation.

AS TO JURISDICTION.

Whether the act approved April 22d, 1882, does or does not constitute a contract, is a question upon which this court acts independent of the decision of the State courts, and as to whether or or not the subsequent acts of the General Assembly impaired the obligation of that contract is a question for the independent action of this court.

In the case of Delmas *vs.* Insurance Company, 14 Wallace, 661, this court say:

> "In the prosecution of that enquiry this court must decide for itself whether any valid contract existed when the legislation complained of was had, and in making up its judgment on that question is not concluded by the decisions of the State court."

In the case of University *vs.* People, 99 U. S., 309, this court say:

> "Whether the statute of 1855 is a valid contract or is void by reason of its conflicting with the Constitution of

1848, under which it was made, is a question on which the judgment of this court can be reviewed here."

In the case of Vicksburg Railroad Company *vs.* Dennis, 116 U. S., 667, that court say:

> "In determining whether a statute of a State impairs the obligation of a contract, this court doubtless must decide for itself the existence and effect of the original contract."

In Wright *vs.* Nagle, 101 U. S., 791, this court say:

> "The construction by the State court of a statute under which a court made an exclusive grant of such franchise within designated limits upon conditions which the grantee performed is not conclusive here upon the question whether a subsequent conflicting grant impairs the obligation of a contract." Louisville & Nashville Railroad *vs.* Palmer, 109 U. S., 256; the Ohio Life Insurance and Trust Company *vs.* Debolt, 16 Howard; Wright *vs.* New Jersey, 117 U. S., 1024; Jefferson Branch Bank *vs.* Shelly, 66 U. S., 173; Murrey *vs.* Charleston, 96 U. S., 432 to 449; Bridge Proprietors *vs.* Hoboken, &c., 1 Wallace, 116; Furman *vs.* Nichol, 8 Wallace, 44; Williams *vs.* Bruffy, 96 U. S., 176–193; Arrowsmith *vs.* Marmoning, 118 U. S., 194; Chicago *vs.* Needles, 113 U. S., 574; Northern University *vs.* the People, 90 U. S., 309; Baltimore *vs.* Maryland, 21 Wallace, 456; Weston *vs.* Charleston, 2 Peters, 499.

That the contract was supported by a public consideration or a public service, see New Orleans Water Works Company *vs.* Rivers, 115 U. S., 527; Ohio Insurance Company *vs.* Debolt, 16 Howard, 428; 84th Ky., 166.

The contract of exemption from taxation for the consideration aforesaid having existed from the 22d of April, 1882, to the 17th day of September, 1886, and the judgment of the highest court in the State of Kentucky having determined that the attempt to assess and collect the taxes for the year 1886 was derived from the 25th section, article 6, chapter 92, of the General Statutes, commonly known as the Hewitt bill, which took effect September 15th, 1886, being for taxes prior to the repeal of the exemption, see pages 26 and 27 of record, and of the act of 23d of May, 1890, also subsequent to the repeal by the Revenue Act of 1886,

make it clear that the two specified acts are laws impairing the obligation of the contract, and are an invasion of rights previously vested. For these reasons we ask that the motion to dismiss be denied, and that the case be reversed.

Respectfully submitted,

T. L. BURNETT, AND
LANE & BURNETT,
Counsel for Plaintiff in Error.

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Water Company *vs.* Commonwealth, 89 Ky.

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Merriwether *vs.* Garrett, 102 U. S., 472 to 573.

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Wright *vs.* New Jersey, 117 U. S., 1024.

Jefferson Branch Bank *vs.* Shelly, 66 U. S., 173.

Murrey *vs.* Charleston, 96 U. S., 432 to 449.

Bridge Proprietors *vs.* Hoboken, &c., 1 Wallace, 116.

Furman *vs.* Nichol, 8 Wallace, 44.

Williams *vs.* Bruffy, 96 U. S., 176–193.

Arrowsmith *vs.* Marmoning, 118 U. S., 194.

Chicago *vs.* Needles, 113 U. S., 574.

Northern University *vs.* the People, 90 U. S., 309.

Baltimore *vs.* Maryland, 21 Wallace, 456.

Weston *vs.* Charleston, 2 Peters, 499.

New Orleans Water Works Company vs. Rivers, 115 U. S., 527.

APPENDIX.

Section 1, chapter 42, General Statutes, page 652:

> "The present fiscal year shall close on the thirtieth day of June, 1882, and thereafter the fiscal year shall begin with the first day of July and close with the thirtieth day of June following, and all regular reports and statements of accounts required by law of the various offices of State shall be made accordingly."

Section 22, chapter 21, General Statutes, page 294:

> "When a law which may have repealed another shall be repealed, the previous law shall not be revived, unless the law repealing it be passed during the same session of the General Assembly."

Section 25, article 6, chapter 92, General Statutes, page 1060:

> "It shall be the duty of the sheriff to report to the county clerk all lists or parts of lists of property which may, for any year or years, have been omitted by the assessor, and all property which corporations may have omitted for any year or years to have listed with the auditor, and said clerk shall enter the same on the assessor's book, for his county, and certify the same to the auditor on or before the last day of January in each year; and the said sheriff shall have, as compensation for said assessment, twenty-five cents, and, in addition to the fee, twenty-five per cent. on the taxes realized on said assessment. But this section does not include property erroneously described by the assessor."

Sections 5 and 6, chapter 970, Acts of 1883–84, page 71:

> "This act shall not apply to any tax payable by any corporation on its capital stock, but only to cases where an *ad valorem* tax is levied; nor shall it in anywise be deemed as a repeal or modification of section ten, of article twelve, of chapter ninety-two, of the General Statutes."

"All laws and parts of laws inconsistent herewith are hereby repealed."

An act to amend the revenue laws of the Commonwealth, giving the State the power to sue for taxes. Vol. 1, pages 149–150, Sess. Acts of 1889–1890:

"The right and power is hereby vested in the Commonwealth to institute and maintain its actions to recover taxes which may heretofore have accrued to the Commonwealth, or which may hereafter accrue, and which cannot be collected by the ordinary methods of distraint and sale. Said suits may be instituted in courts of equity jurisprudence for the purpose of enforcing the State's lien on property which for any reason cannot be sold, and for the purpose of reaching intangible property which cannot otherwise be reached. But no action shall be instituted or maintained under the provisions of this act upon any claim for taxes that have been assessed or might have been assessed more than five years before the commencement of the same."

No. 179.

Brief of Burnett for P. E.

FILED
DEC 13 1897
JAMES H. McKENNEY,
CLERK

Filed Dec. 13, 1897.

SUPREME COURT OF THE UNITED STATES

LOUISVILLE WATER COMPANY, . . Plaintiff in Error,

VERSUS

COMMONWEALTH OF KENTUCKY, . Defendant in Error.

IN ERROR TO THE COURT OF APPEALS OF KENTUCKY.

T. L. BURNETT,
LANE & BURNETT,
For Plaintiff in Error.

PRINTED BY THE BRADLEY & GILBERT COMPANY.

SUPREME COURT OF THE UNITED STATES

LOUISVILLE WATER COMPANY, . . PLAINTIFF IN ERROR,

vs.

COMMONWEALTH OF KENTUCKY, DEFENDANT IN ERROR.

IN ERROR TO THE COURT OF APPEALS OF KENTUCKY.

This writ of error is prosecuted to reverse a judgment of the Court of Appeals of Kentucky filed March 27, 1896. By an act of the General Assembly of the Commonwealth of Kentucky approved 22d of April, 1882, amending the charter of the Louisville Water Company and exempting it from the payment of taxes of all kinds—State, municipal, and special—it was provided:

> "1. It shall be the duty of the Louisville Water Company to furnish water to the public fire-cisterns and public fire-hydrants of the city of Louisville for fire protection free of charge.
>
> "2. The Sinking Fund of the city of Louisville being the owner of the stock of the Louisville Water Company, and said water company by virtue thereof is the property of the city of Louisville, therefore the Louisville Water Company is hereby exempt from the payment of taxes of all kinds, of whatever character, State, municipal, or special. This act shall take effect from and after its passage." I Sess. Acts, 1882, p. 915.

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The construction of this act was before this Honorable Court in the case of the Louisville Water Company, plaintiff in error, against William Clark, sheriff of Jefferson County, defendant in error, reported in 143 U. S., page 1. Opinion of the court by Justice Harlan.

The act of 22d of April, 1882, was accepted by the Water Company, and from its date to the 15th of September, 1886 (the day on which the act known as chapter 92, General Statutes of Kentucky, took effect), did furnish an abundant supply of water to the public fire-cisterns and public fire-hydrants of the city of Louisville for fire protection free of charge. (See Record, pages 10 and 21.)

The charter of the Louisville Water Company was approved March 6, 1854, being an act to incorporate the Louisville Water Company, see second volume of Acts Kentucky Legislature, 1853–54, page 121, the sixth section of which provides, among other things:

> "In the laying and construction of pipes and aqueducts in the city of Louisville, the same shall be so laid and constructed that an abundant supply of water can be drawn therefrom for the extinguishment of fires, and said corporation shall furnish water to the city of Louisville for the extinguishment of fires and cleaning streets upon such terms as may be agreed upon between it and the authorities of said city."

After the act of 22d of April, 1882, and in accordance therewith, an abundant supply of water for all such purposes was furnished by the Water Company free of charge down to and including the year 1886. The charter of the plaintiff in error and all amendments thereto, and all the revenue laws of the State of Kentucky, including the revenue act of May 17, 1886, being chapter 92 of the General Statutes, edition of 1887, were reviewed by this Honorable Court in the case of the Louisville Water Company against Clark, sheriff, 143 U. S. Reports, page 1. In that case (which involved only taxes for the year 1887) it was determined that the act approved February 14, 1856, entitled "An act reserving power to amend and repeal charters and other laws," should be read as a part of the act of 22d of April, 1882, and that

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under this reserved power the State could repeal the exemption from taxation by the passage of the revenue law approved the 17th of May, which, by its terms, took effect the 15th of September, 1886, and used this language:

> "In determining the object and scope of the act of 1882, we must look at all of its provisions. The Water Company was under a duty by its charter, passed before the act of 1856, to furnish water for the extinguishment of fires and the cleansing of streets, not free of charge, but upon such terms as might be agreed upon by it and the city. And the legislature certainly did not assume to impose upon it the obligation to furnish water for fire protection, free of charge, except in connection with the grant to it of immunity from taxation. Accepting, however, the benefits of this exemption from taxation, it became bound to supply water for public purpose free of charge. But that obligation remained only so long as the exemption continued in force. The act of 1882 is to be regarded as an entirety, and meant nothing more than that the company should furnish water for fire protection, free of charge, so long as the immunity from taxation continued. This view is in harmony with the act of 1856, which expressly declares that whilst privileges and franchises granted to corporations, after its passage, could be changed or repealed, no amendment or repeal should impair other rights previously vested. The effect of the withdrawal of the immunity from taxation was, therefore, to leave the Water Company in the position it was before the passage of the act of 1882 in respect to its rights to charge for water furnished for public fire-cisterns, fire-plugs, or hydrants."

We therefore conclude that there was a contract created by the act of 1882, and that it existed from that date until under the provisions of the act of 1856, read in connection with said act, it was repealed by the revenue act approved the 17th of May, 1886, and, that as the obligation to furnish water for fire protection free of charge continued from the 22d of April, 1882, to the date the revenue act of 1886, approved the 17th of May, took effect, to-wit, the 15th of September, it must follow that the exemption from

taxation continued for the same period. It follows that an attempt to collect the tax for the year 1886 is an attempt to destroy rights previously vested by the obligation of the contract. If the conclusion is right that this exemption from taxation was withdrawn by the revenue act of 1886, any attempt to collect from the plaintiff in error taxes upon its property between the 22d of April, 1882, and the 15th of September, 1886, whether by virtue of the law of 1886, or any law subsequent thereto, violates the plaintiff's right of protection under its contract

The taxes under consideration in this case are for the fiscal year of the State of Kentucky ending June 30, 1886, General Statutes, page 652, edition of 1887 (see Appendix I), a year covered by the period during which the contract of exemption as set out in the act of April 22, 1882, was in full force, and our next step in the development of this case is to determine when the statute was passed under the authority of which the taxes in question were assessed and levied and the action for their recovery instituted and prosecuted to a judgment. The act of April 22, 1882, was in conflict with section 1, article 1, and section 23, article 8, of chapter 92, General Statutes, edition of 1873, and effected the repeal of every statute in the State of Kentucky fixing a rate of taxation or levying or imposing a tax upon the plaintiff in error or its property.

By section 22, chapter 21, General Statutes (see Appendix I), edition of 1873, in force on the 22d day of April, 1882, and thereafter and now in force, it was enacted that "when a law which may have repealed another shall be repealed, the previous law shall not be revived unless the law repealing it be passed during the same session of the General Assembly."

If the act of April 22, 1882, gave to the plaintiff in error the benefits of the exemption and immunities therein provided for, it is clear that to that extent the act of April 22, 1882, effected a repeal of the revenue laws of the State of Kentucky in so far as they authorized, suffered, or permitted the fixing of a rate of taxation or the levying or the imposition of a tax upon the plaintiff in error or its property, or the assessment of the plaintiff in error or its property for taxation by the State, or the collection from the plaintiff in error by coercive measures of any tax imposed by the State. This court takes judicial notice of the fact that the General Assembly of the Commonwealth of Kentucky never did re-enact

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the revenue laws repealed by the act of April 22, 1882, so far as the plaintiff in error and its property were concerned, in direct terms, and that the only re-enactment of such laws was by indirection, and is found in section 25, article 6, of the act approved May 17, 1886, which provides that, "It shall be the duty of the sheriff to report to the county clerk all lists or parts of lists of property which may for any year or years have been omitted by the assessor, and all property which corporations may have omitted for any year or years to have listed with the auditor, and said clerk shall enter the same on the assessor's book for his county, and certify the same to the auditor on or before the last day of January in each year."

It is the contention of the plaintiff in error in this case that in so far as said section and article authorizes an assessment of its property or the imposition of a tax upon it for the year 1886, in which year its property was omitted by the assessor, and in which year it omitted to list its property with the auditor, impairs the obligation of the contract set out in the act of the 22d of April, 1882.

As will be seen, section 25, article 5, of the act of May 17, 1886 (Appendix I), undertakes to put into force and to revise, so far as the plaintiff in error and its property is concerned during the period of time the act of April 22, 1882, was in force, all the revenue law and provisions of the revenue laws that were repealed, in so far as the plaintiff in error and its properties were concerned, by the act of April 22, 1882.

The contention of the defendant in error that the act approved April 22, 1884, entitled "An act to amend the revenue laws," vol. 1, page 70–71, Sess. Acts of 1883–84, was an authority for the assessment, imposition, or collection of the taxes under consideration in this case, is founded on a misconception of the act itself, as will be seen from section 5 of that act, which in express terms provides that "this act shall not apply to any tax payable by any corporation on its corporate stock, but only to cases where an ad valorem tax is levied." (Appendix I.) The act discloses that there is no express repeal in it of the act of April 22, 1882, or any reference in it to the act of April 22, 1882, other than in this language, "that this act shall apply only to cases where an ad valorem tax is levied." Now, on the 22d day of April, 1884, no ad valorem tax was levied by the State on the plaintiff in error or

its property, and it is expressly set out in the act of the 22d of April, 1884, that it was not to apply in a case where no ad valorem tax was levied.

By section 6 of the act approved April 22, 1884, it is provided "that all laws and parts of laws inconsistent herewith are hereby repealed." Now, as the act of April 22, 1882, is not irreconcilable with or repugnant to any provision contained in the act of April 22, 1884, as both acts can be enforced in the same territory at the same time, and full effect given to each, it is perfectly clear that the act of April 22, 1884, furnishes no authority for the imposition, assessment, or collection of the tax under consideration in this case. It is clear that unless the act of April 22, 1884, operated as a repeal of the act of April 22, 1882, it furnished no authority for the imposition of any tax on the plaintiff in error or its properties, or the assessment of the plaintiff in error or its properties, for taxation by the State.

Not only was there no authority given by the act approved April 22, 1884, for the imposition, assessment, and collection of the taxes under consideration in this case, but the act itself was repealed by the act approved May 17, 1886, that went into effect on September 15, 1886.

In the case of the Commonwealth *vs.* the Railroad Companies, 95 Ky., pages 68 to 75, inclusive, the Court of Appeals, in determining the effect of the act approved May 17, 1886, upon the act as approved May 22d, 1884, and kindred acts, say:

> "In determining the force and effect of this latter act on prior legislation, general and special, regulating taxation in the Commonwealth, it is evident that its general purpose and intent should be given much weight. Manifestly the act of 1886 *is intended to compass the reform of the entire revenue law of the State, to constitute in itself a general and complete revenue system.* As argued by counsel, it singles out no special defect here and there, but is aimed broadcast at the whole structure, else why should it have re-enacted as it does many old laws in identical and equivalent terms. This general purpose, to be made effective and uniform, must sweep away a mass of special and class legislation adopted in pursuance of the system theretofore in practice. We notice first that all property, real and personal, shall be

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assessed for taxation, save that expressly exempted in the act itself. Not content with this the act proceeds to repeal all acts and parts of acts, general and special, inconsistent with itself or not in conformity to itself. Sunderland on Statutory Construction, sections 154, 155, 156; Endlich on the Interpretation of Statutes, section 201."

As the act of April 22, 1884, was inconsistent in many of its provisions with the act of May 17, 1886, the latter act, on the rules laid down by the Kentucky Court of Appeals, and according to the recognized canons of construction, repealed the act of the 22d of April, 1884. 143 U. S., page 2.

The taxes under consideration in this case were assessed and levied on the 9th day of January, 1891, more than four years and three months after the same went into effect, under authority of section 25, article 6, of the act of May 17, 1886, more than four years and three months after the act of April 22, 1884, had been repealed by the act of May 17, 1886. In the opinion delivered by the Kentucky Court of Appeals in this case it will be found recited, page 26 of the record, that:

"The authority for reporting the tax list to the clerk of the county court is to be found in section 25, article 6, chapter 92, of the General Statutes, commonly called the Hewitt bill. The material part of the section is as follows: 'It shall be the duty of the sheriff to report to the county clerk all lists or parts of lists of property which may for any year or years have been omitted by the assessor, and all property which corporations may have omitted for any year or years to have listed with the auditor, and said clerk shall enter the same on the assessor's books for his county, and certify the same to the auditor on or before the last day of January in each year. The law does not specify how and in what manner or form the report shall be made, and that it appears that the clerk accepted the report and certified the same, as required by law, the report of the sheriff and the certificate of the clerk must be held sufficient for the purposes of this action.' . . . . The act of the 17th of May, 1886, before referred to, was, as is well known, a revenue bill, and the object was to increase the revenues,

not to decrease them, and it expressly excepted all obligations incurred under existing laws from repeal. It is, therefore, clear that if appellant had become liable for the tax of 1886, the act *supra* did not release it from such liability, nor can we agree with the appellant that the act *supra* is only prospective. The evident purpose of the act was to confer power upon the sheriff greater than he had theretofore been invested with, and there is nothing in the act to authorize the conclusion that the power and the duty devolved upon the sheriff had reference only to the future. Such an intent would not have been consistent with the object of the act. Appellant insists that the revenue law of 1892 repealed the act of 1890, which authorized the bringing of such suits as this. We do not concur in the appellant's construction of the act of 1892. We do not think it was the intention of the legislature to repeal the act of 1890."

We thus have the express decision of the Court of Appeals to the effect that section 25, article 6, of the act approved on the 17th day of May, 1886, was the authority, and is the authority, for the assessment and imposition of the tax under consideration in this case; so that it is clear that the obligation of the contract as contained and set out in the act of April 22, 1882, in so far as it secured an exemption against the assessment and imposition of the tax, is violated by this subsequent legislation. But as seen from the opinion of the Court of Appeals, section 25, article 6, of the act approved May 17, 1886, was and is supplemented and amended by an act of the General Assembly of the Commonwealth of Kentucky, approved on the 23d day of May, 1890, entitled:

"'An act to amend the revenue laws of the Commonwealth of Kentucky, giving the State the power to sue for taxes,' Vol. I, pages 149–150, Sess. Acts 1889–90, and which is in words and figures as follows: 'The right and the power is hereby vested in the Commonwealth to institute and maintain its actions to recover taxes which may heretofore have accrued to the Commonwealth, or which may hereafter accrue, and which can not be collected by the ordinary methods of distraint and sale. Said suits may

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be instituted in courts of equity jurisprudence for the purpose of enforcing the State's lien on property which for any reason can not be sold, and for the purpose of reaching intangible property which can not otherwise be reached. But no action shall be instituted or maintained under the provisions of this act upon any claim for taxes that have been assessed or might have been assessed more than five years before the commencement of the same." (Appendix II.)

Prior to May 23, 1890, it had become the settled law of the State of Kentucky that the properties of the defendant in error could not be taken, levied on, or sold by the sheriff or collecting officer to coerce the payment by it of any tax or assessment against it upon its property, and it had further become the settled law of the State of Kentucky that the State was without power to go into its courts and maintain an action against the plaintiff in error to recover any tax or assessment against the defendant in error or upon its property.

In the case of the Louisville Water Company *vs.* Hamilton, 81 Ky., 522, the Court of Appeals say:

> "This corporation, like a turnpike or railroad, can not be seized or sold by a collecting officer, nor the property necessary for its use, so as to deprive the public of the benefit to be derived from it, unless by legislative authority."

In the case of the Louisville Water Company *vs.* the Commonwealth, 89 Ky., 349, the Court of Appeals say:

> "It was held by this court in the case of Baldwin *vs.* Hewitt, auditor, &c., 88 Ky., 673, that taxes could not be recovered by suit in the absence of legislative authority, and there being no statute in this State save as to railroad companies, an action for such a purpose could not be maintained, even in the absence of any other adequate remedy. . . . . And the exercise of the power of taxation is legislative in character, while the collection of taxes when once authorized by the law-making power is ministerial. The one is legislative, the other executive; neither is a

judicial act, and one department of the government should be careful not to encroach upon the dominions of another. It is true that the judiciary may be called upon by the legislature to enforce the collection of taxes in a judicial way, but it has not done so in this State save as to railroads, where suit has been authorized to recover them, and this exceptional case inferentially says that the remedy can not be resorted to in other cases. . . . . The judiciary should not, in our opinion, merely because of legislative silence as to the collection of a tax, imply to itself a power not inherent in itself, and the exercise of which will not only be confusing as to the powers of the different branches of the government, but likely lead to great abuse. Indeed, in view of the legislation as to taxes owing by railroads, it can not do so. We do not intimate whether in this instance the taxes are or are not owing, but merely decide that for the lack of legislation no action can be maintained looking to their collection. If in such a case the State is likely to lose any of its revenue, the legislature can, by additional legislation in the form of penalties for the non-payment, or by authorizing suit for its recovery, provide against it, and will no doubt do so when in its wisdom it may be proper and necessary."

In the case of the Louisville Water Company *vs.* Clark, &c., 94 Ky., 54, the Court of Appeals say that the reason for the reversal by the Court of Appeals of the judgment of the court of first instance in the case of the Louisville Water Company *vs.* the Commonwealth, 89 Ky., 244, was that the court of first instance had no jurisdiction of the subject-matter of the action.

In the case of Baldwin *vs.* Hewitt, 88 Ky., 682, the Court of Appeals say:

> "The same reason which forbids the court to levy a tax forbids it from assuming the power to collect it."

In the case of McLean *vs.* Deposit Bank, 81 Ky., 258, the court say:

> "The judiciary has no power to levy taxes or to collect taxes when the officer appointed to collect them refuses to

> do so, or if no one is appointed to collect the judiciary is powerless to supply the defect. These are all legislative duties, and when the department of government to which these duties are confided neglects to discharge them, neither the judiciary or executive department of the government can execute these powers."

In the case of Merriwether *vs.* Garrett, 102 U. S., 472–573, this court, considering the same subject, say:

> "Having the sole power to authorize the tax, it must equally possess the sole power to prescribe the means by which the tax shall be collected and to designate the officers through whom its will shall be enforced."

We thus see that not only were the taxes under consideration in this case assessed and levied under the authority of section 25, article 6, of the act of May 17, 1886, but their collection was provided for by the act of the 23d of May, 1890, legislation that went into effect at least four years and six months in one instance, and more than eight years in the other instance after the date of the contract relied upon by the plaintiff in error as securing to it the exemption from liability for the taxes sued for, and hence it does certainly appear that the legislation complained of was subsequent to the date of the contract set up by the plaintiff in error, and it was legislation under which every right claimed by the plaintiff in error as vested in it by the contract of April 22d, 1882, was taken from it by the judgment of the courts of the State of Kentucky, and which furnishes the foundation for the writ of error in this action.

To this action, commenced upon the 9th day of January, 1891, to recover a tax from the plaintiff in error for the fiscal year of the State of Kentucky ending June 30, 1886, imposed and assessed under the authority of section 25, article 6, of the act approved May 17, 1886, and which did not go into effect until the 15th of September, 1886, and to this action thus commenced against it under the authority of an act approved on the 23d day of May, 1890, the plaintiff in error interposes as a defense the exemption from liability sought to be enforced against it in the action secured to it by the act of April 22d, 1882, and which act was in

force up to the 15th of September, 1886, covering the identical period of time for which the alleged taxes were levied. The plaintiff in error asserted in its answer that this contract exemption was protected by the Federal Constitution against any impairment of its obligation by the subsequent legislation of Kentucky authorizing the imposition and the assessment of the taxes in question and the action or suit against it for their recovery. This contention of the plaintiff in error was met by a decision of the court of first instance, and by the court of last resort in the State of Kentucky, that the act of April 22, 1882, did not constitute a contract between the State of Kentucky and the Louisville Water Company, and did not secure the immunity from taxation as contended for by the plaintiff in error, and hence the Federal question that gives to this court jurisdiction is whether or not it is with this court or the courts of Kentucky to determine whether the act of April 22, 1882, constitutes a contract, the obligations of which are protected by the Federal Constitution from impairment by said legislation.

AS TO JURISDICTION.

The question of jurisdiction was certainly considered in the case of the Louisville Water Company *vs.* Clark, 143d U. S., page 1. As that case involved the liability of the present plaintiff in error for the taxes of 1887, and the present contention is for the taxes claimed for 1886, the question of jurisdiction would seem to be settled by the first case *supra*. Whether the act approved 22d of April, 1882, does or does not constitute a contract is a question upon which this court acts independent of the State courts, and as to whether or not the subsequent acts of the General Assembly impair the obligation of that contract is a question for the independent action of this court.

In the Delmas *vs.* Merchants Insurance Company, 81st U. S., 759, the court say:

> "Besides, this court has always jealously asserted the right, when the question before it was the impairing of the obligation of a contract by State legislation, to ascertain for itself whether there was a contract to be impaired. If it were not so, the constitutional provision could always be evaded by the State courts giving such construction to the

contracts, or such decisions concerning its validity, as to render the power of this court of no avail in upholding it against unconstitutional State legislation. Bridge Prop. *vs.* Hoboken Co., 1 Wall., 145 (68 U. S., XVII, 576); J. B. B'k *vs.* Skelly, 1 Black, 436, (66 U. S., XVII, 173)."

In the case of the Northwestern University *vs.* the People, 99 U. S., 389, the court say:

"Whether that contract is such as to be impaired by these later laws is one of the questions of which this court always has jurisdiction. Jefferson B'k. *vs.* Skelly, 1 Black, 436, (66 U. S., XVII, 173); Bridge Props. *vs.* Hoboken Co., 1 Wall., 144 (68 U. S., XVII, 576); Delmas *vs.* Ins. Co., 14 Wall., 668 (81 U. S. XX., 759).

In the case of Vicksburg, Shrevesport and Pacific R. R. Co., *vs.* Dennis, 116 U. S., 771, the court say:

"In determining whether a statute of a State impairs the obligation of a contract, this court doubtless must decide for itself the existence and effect of the original contract, although in the form of a statute, as well as whether its obligation has been impaired. L. & N. R. R. Co. *vs.* Palmes, 109 U. S., 244, 256, 257 (Bk. 27, L. ed., 922, 926), and cases cited; Wright *vs.* Nagle, 101 U. S., 791, 794 (Bk. 25, L. ed., 921, 922)."

In the case of Wright *vs.* New Jersey, 117 U. S., 1024, this court said:

"When it is charged that the obligation of a contract has been impaired by a State law, as in this case, by the general tax law of New Jersey as administered by State authorities and the State court justify such impairment by the application of some general rule of law to the facts of the case, it is our duty to inquire whether the justification is well grounded. If it is not, the party is entitled to the benefits of the constitutional protection."

In Jefferson Branch Bank *vs.* Skelly, 66 U. S., 173, this court said:

> "It has never been denied, nor is it now, that the Supreme Court of the United States has an appellate power to revise the judgment of the Supreme Court of a State, whenever such a court shall adjudge that not to be a contract which has been alleged, in the forms of legal proceedings, by a litigant, to be one, within the meaning of that clause of the Constitution of the United States which inhibits the States from passing any law impairing the obligation of contracts. Of what use would the appellate power be to the litigant who feels himself aggrieved by some particular State legislation, if this court could not decide, independently of all adjudication by the Supreme Court of a State, whether or not the phraseology of the instrument in controversy was expressive of a contract and within the protection of the Constitution of the United States, and that its obligation should be enforced, notwithstanding a contrary conclusion by the Supreme Court of a State? It never was intended, and can not be sustained by any course of reasoning, that this court should or could, with fidelity to the Constitution of the United States, follow the construction of the Supreme Court of a State in such a matter, when it entertained a different opinion; and in forming its judgment in such a case, it makes no difference in the obligation of this court, in reversing the judgment of the Supreme Court of a State upon such a contract, whether it be one claimed to be such under the form of State legislation or has been made by a covenant or agreement by the agents of a State or by its authority."

In the case of Murrey *vs.* Charleston, 96 U. S., 432, 449, this court say:

> "The jurisdiction of this court over the judgments of the highest courts of the States is not to be avoided by the mere absence of an express reference to some provision of the Federal Constitution. Whenever rights, acknowledged and protected by that instrument, are denied or invaded under the shield of State legislation, this court is authorized

to interfere. The form and the mode in which the Federal question is raised in the State courts is of minor importance, if, in fact, it was raised and decided. The act of Congress of 1867 gives jurisdiction to this court over final judgments in the highest courts of a State in suits where is drawn in question the validity of a statute of, or of an authority exercised under any State on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision is in favor of their validity. Not a word is said respecting the mode in which it shall be made to appear that such a question was presented for decision. In the present case it is necessarily involved without any formal reference to any clause in the Constitution, and it is difficult to see how any such reference could have been made to appear expressly. In questions relating to our jurisdiction, undue importance is often attributed to the inquiry whether the pleadings in the State courts expressly assert a right under the Federal Constitution. The true test is not whether the record exhibits an express statement that a Federal question was presented, but whether such a question was decided, and decided adversely to the Federal right. Everywhere in our decisions it has been held, that we may review the judgments of a State court when the determination or judgment of that court could not have been given without deciding upon a right or authority claimed to exist under the Constitution, laws, or treaties of the United States, and deciding against that right. Very little importance has been attached to the inquiry whether the Federal question was formally raised. In Crowell *vs.* Randall, 10 Peters, 368, it was laid down, after a review of almost all of our previous decisions, 'That it is not necéssary the question should appear on the record to have been raised, and the decision made in direct and positive terms, in *ipsissimis verbis*, but that it is sufficient if it appears, by clear and necessary intendment, that the question must have been raised, and must have been decided in order to have induced the judgment.' This case is followed by Armstrong *vs.* Athens Co. Treas., 16 Peters, 281, when it was held sufficient to give this court jurisdiction. If it appear from the record of the State court that the Federal

question was necessarily involved in the decision, and that the court could not have given the judgment or decree which they passed without deciding it."

In the case of Bridge Proprietors *vs.* Hoboken, &c., 1 Wallace, 116, this court say:

> "Looking at the record before us and applying to it these principles, we find no difficulty in the matter. The defendants claim, under the act of 1860 of the New Jersey Legislature, a right to build their railroad bridge or viaduct over the Hackensack River, inside the limits prohibited by the act of 1790. The plaintiffs say, that to permit this is to violate the contract which they have with the State of New Jersey, and, therefore, the act of 1860, so far as it confers such authority on the defendants, is made void by the Constitution of the United States, because it impairs the obligation of a contract. It could not have done this without holding the act of 1860 to be valid, as it was the only authority in which the defendants rested their right to build any structure whatever over the Hackensack River. In holding the act to be valid, notwithstanding the plaintiffs claim that it was void as impairing the obligation of their contract with the State of New Jersey, a decision was made within the very terms of the 25th section of the act of Congress of 1789. It is said, however, that it is not the validity of the act of 1860 which is complained of by the plaintiffs, but the construction placed upon that act by the State court. If this construction is one which violates the plaintiff's contract, and it is the one on which the defendants are acting, it is clear that the plaintiffs have no relief except in this court, and that this court will not be discharging its duty to see that no State legislature shall pass a law impairing the obligation of a contract, unless it takes jurisdiction of such cases."

In the case at bar the defendant in error claimed the right of the State to tax the property and effects of the plaintiff, under authority of the act of May 17, 1886, notwithstanding the exemption from that liability, guaranteed by the act of April 22, 1882.

The plaintiff contended that to permit this was to violate the contract between the Commonwealth and itself, as set out in the act of 1882; that by reason of section 10, article 1, of the Constitution of the United States, and the contract as set out, there existed no right or authority on the part of the State to tax its property or effects, under the provisions of the act of May 17, 1886, which was the only and sole authority, as the court judicially knew, for the imposition of the alleged taxes. The court held that the alleged contract, the act of April 22, 1882, did not exempt the property and effects of the plaintiff in error from the operation and force of the act of May 17, 1886, and this decision brings the case within the very terms of the 25th section of the act of Congress of 1789.

In the case of Furman *vs.* Nichol, 8 Wallace, 44, this court say:

> "The circumstances under which this court is authorized to review the decisions of the State tribunals has been so often considered and decided, that there is hardly anything left to do but to apply the already well settled principles which govern this class of cases to a particular record in order to decide whether or not we have jurisdiction to hear and determine the matter in controversy. It would be useless labor to go through the various adjudications of this court on this subject. It is enough for the purposes of this suit to say that a cause can be removed from a State court into this court under the 25th section of the judiciary act of 1789, whenever some one of the questions embraced in it was relied on by the party who brings the cause here, and when the right he claimed it gave him was denied to him by the State court. It is urged that the particular provision of the Constitution, which the plaintiffs in error say has been violated in its application to the case, should be contained in the pleadings, but this is in no case necessary. If the record shows, either by express averment or by clear and necessary intendment, that the constitutional provision did arise, and that the court below could not have reached the conclusion and judgment it did reach without applying it to the case in hand, then the jurisdiction of this court attaches, and it need not appear that the State court erred in its judgment. It is sufficient to confer jurisdiction that

the question was in the case, was decided adversely to the plaintiff in error, and that the court was induced by it to make the judgment, which it did. . . . . All courts take notice, without pleading, of the Constitution of the United States and the public laws of the State where they are exercising their functions. . . . . The defense really amounts to this, either that the alleged contract did not exist, or if it did, there has been no legislation that impairs it. Whether it be true or false, depends upon the construction to be given the laws of the State which are claimed as proving the making of the contract and its violation. If so, this court decides for itself whether the construction which the court below gave to these different statutes was correct or incorrect, and we are required to reverse, under the 25th section of the judiciary act, if we find that under an error of construction that court has adjudged that no contract has been impaired. To do otherwise would be to surrender to the State courts an important trust confined to this court by the Constitution. Without pursuing the subject any further, it is clear, from the record, that the Supreme Court of Tennessee, in dismissing the petition for mandamus, necessarily adjudged that there was not at the time such a contract as the plaintiff, Furman, claimed, authorized him to make the tender to the clerk of the notes of the Bank of Tennessee. The jurisdiction of this court is therefore complete, and the case must be decided on its merits." Williams *vs.* Bruffy, 96 U. S., 176–193; Arrowsmith *vs.* Harmoning, 118 U. S., 194; Chicago *vs.* Needles, 113 U. S., 574; Northern University *vs.* The People, 90 U. S., 309; Baltimore *vs.* Maryland, 21 Wallace, 456; Weston *vs.* Charleston, 2 Peters, 499.

In the case at bar the plaintiff in error contended that the act of April 22, 1882, was a contract between the State and itself, and vested in it a right to immunity from taxation by the State until withdrawn by the act of May 17, 1886, and that by the Constitution of the United States the State was forbidden to impair it.

The court below decided the act of April 22, 1882, accepted by the Louisville Water Company, was no contract between the State and the plaintiff in error, that it did not invest the plaintiff

with immunity from taxation by the State, as claimed, that it was not protected by the Constitution of the United States, and that the imposition of taxes by the State under the provisions of the act of May 17, 1886, consequently impaired the obligation of no contract. These issues were expressly made in the case and decided adversely to the plaintiff in error, and were necessarily decided in the judgment rendered, and we submit that this court has jurisdiction, and the case is properly in this court for final determination on its merits, and for the reasons given the case should be reversed.

Respectfully submitted, T. L. BURNETT AND
LANE & BURNETT,
Attorneys for Plaintiff in Error.

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Northwestern University *vs.* The People, 99 U. S., 389.

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Wright *vs.* New Jersey, 117 U. S., 1024.

Jefferson Branch Bank *vs.* Skelly, 66 U. S., 173.

Murrey *vs.* Charleston, 96 U. S., 432, 449.

Bridge Proprietors *vs.* Hoboken, &c., 1 Wallace, 116.

Furman *vs.* Nichol, 8 Wallace, 44.

APPENDIX I.

Section 1, chapter 42, General Statutes, page 652:

"The present fiscal year shall close on the thirtieth day of June, 1882, and thereafter the fiscal year shall begin with the first day of July and close with the thirtieth day of June following, and all regular reports and statements of accounts required by law of the various offices of State shall be made accordingly."

Section 22, chapter 21, General Statutes, page 294:

"When a law which may have repealed another shall be repealed, the previous law shall not be revived, unless the law repealing it be passed during the same session of the General Assembly."

Section 25, article 6, chapter 92, General Statutes, page 1060:

"It shall be the duty of the sheriff to report to the county clerk all lists or parts of lists of property which may, for any year or years, have been omitted by the assessor, and all property which corporations may have omitted for any year or years to have listed with the auditor, and said clerk shall enter the same on the assessor's book, for his county, and certify the same to the auditor on or before the last day of January in each year; and the said sheriff shall have, as compensation for said assessment, twenty-five cents, and, in addition to the fee, twenty-five per cent. on the taxes realized on said assessment. But this section does not include property erroneously described by the assessor."

Sections 5 and 6, chapter 970, Acts of 1883–84, page 71:

"This act shall not apply to any tax payable by any corporation on its capital stock, but only to cases where an ad valorem tax is levied; nor shall it in any wise be deemed as a repeal or modification of section ten, of article twelve, of chapter ninety-two, of the General Statutes.

"All laws and parts of laws inconsistent herewith are hereby repealed."

APPENDIX II.

An act to amend the revenue laws of the Commonwealth, giving the State the power to sue for taxes. Vol. I, pages 149–150, Sess. Acts of 1889–1890:

> "The right and power is hereby vested in the Commonwealth to institute and maintain its actions to recover taxes which may heretofore have accrued to the Commonwealth, or which may hereafter accrue, and which can not be collected by the ordinary methods of distraint and sale. Said suits may be instituted in courts of equity jurisprudence for the purpose of enforcing the State's lien on property which for any reason can not be sold, and for the purpose of reaching intangible property which can not otherwise be reached. But no action shall be instituted or maintained under the provisions of this act upon any claim for taxes that have been assessed or might have been assessed more than five years before the commencement of the same."

No. 179.

Brief of Helm & Bruce for Def'd.

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179

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Supreme Court of the United States.

OCTOBER TERM, 1897.

LOUISVILLE WATER COMPANY, PLAINTIFF IN ERROR,

vs.

COMMONWEALTH OF KENTUCKY, DEFENDANT IN ERROR.

BRIEF FOR DEFENDANT IN ERROR.

JAMES P. HELM,
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Counsel for Defendant in Error.

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C. 1-6-'98

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BRIEF FOR DEFENDANT IN ERROR.

STATEMENT.

Suit was brought by the Commonwealth of Kentucky and H. A. Bell, sheriff, against the Louisville Water Company in January, 1891, seeking to collect from the water company taxes due the State for the year 1886. The property had not been assessed in 1886, but was subsequently, in 1891, reported by the sheriff as "omitted property," and was thereupon assessed as of January 10, 1886, and this action was brought to collect the taxes due upon that assessment.

At the time this assessment was made and this action instituted, January, 1891, there was in effect a general revenue statute, approved May 17, 1886, and which is commonly known in the legislative and judicial history of Ken-

tucky as the "Hewitt act" (General Statutes of Kentucky, editions of 1887 and later, chapter 92); but the tax involved in this action, being the tax for the year 1886, had been imposed as of the 10th of January of that year under and by the law in force prior to the adoption of the Hewitt act of May 17, 1886, and, accordingly, the amount claimed as taxes due from the water company for the year 1886 was ascertained according to the rate of taxation which prevailed on January 10, 1886, which was 51½ cents on each $100 of value (Rec., p. 2), though the act of May 17, 1886, imposed a tax rate of 47 cents on each $100 of value (Appendix I), and the tax rate in force for the year 1891, the year the assessment was actually made by the sheriff, was 42 cents on the $100 of value. (Appendix II.)

The defendant company made a number of defenses to the action.

Among other defenses, it claimed that the Hewitt act of May 17, 1886, had repealed all prior taxing statutes, and hence had released the defendant from its obligation to pay the tax of 1886, if any such obligation had ever existed. To this the court of appeals of Kentucky responded by calling attention to the fact that this Hewitt act "expressly excepted all obligations incurred under existing laws from repeal." (Rec., p. 27.)

Defendant also contended that by an act of the legislature of Kentucky, approved April 22, 1882, and accepted by defendant, its property had been exempted from taxation, and that thereby a contract of exemption had been made with the State, and that defendant's property was therefore not subject to taxation in 1886. Upon this question the court of appeals simply held that this exempting statute had been held to be unconstitutional by the court of appeals in the case of Clark, sheriff, *vs.* The Louisville water company, 90 Ky., 515, and hence this defense was not maintainable. (Rec., p. 27.)

Other defenses were made, which it is not material now

to mention, because they do not present a Federal question, but all of which were overruled by the court of appeals, and the judgment of the lower court in favor of the State for the amount of the tax was affirmed; and the water company has now brought the case to this Court by writ of error.

The plaintiff in error is the same corporation which was plaintiff in error in the case of The Louisville Water Company *vs.* Commonwealth of Kentucky, heretofore decided by this Court, the opinion being reported in 143 U. S., 1. There is this difference, however, between that case and this one: That case involved the tax for the year 1887, the year subsequent to the passage of the Hewitt act, while the present case involves the tax of 1886, which accrued prior to the passage of the Hewitt act; and the point upon which this Court decided the case involving the tax of 1887 was that the Hewitt act by its terms repealed all exemptions from taxation, including the exemption of the Louisville Water Company, and that the legislature had the lawful power to make the repeal; so that there was therefore no ground for the company's refusal to pay the tax of 1887.

The water company attempted to make a Federal question by its answer in the State court as follows: After having stated with great detail the passage of the exempting statute of April 22, 1882, and the company's acceptance thereof, and performance of obligations thereunder, etc., it then made the following statement:

"And this defendant, further answering, says that the alleged and pretended assessment set up and asserted in the petition in this action have for their authority an act of the General Assembly of the Commonwealth of Kentucky approved upon the 17th day of May, 1886, and entitled An act to amend the revenue laws of the Commonwealth of Kentucky, and said pretended assessment and levy asserted and set up in the petition and sought to be enforced herein has no other countenance or authority than the said act hereinbefore referred to as approved the 17th day of May, 1886.

"And the defendant says that the said act of May 17,

1886, furnishes the only authority for the pretended and alleged assessment and levy set up and asserted in the petition in this action.

"And this defendant, relying upon its said contract as hereinbefore set out and as evidenced by the act hereinbefore referred to as approved on the 22nd day of April, 1882, avers and says that in so far as the said act approved on the 17th day of May, 1886, seeks to authorize, justify, or countenance an assessment of or levy of a taxation upon the property of this defendant that said act approved May 17, 1886, is in violation of the Constitution of the United States, for the reason that the same impairs the obligation of the contract of the Commonwealth of Kentucky hereinbefore set out by the act hereinbefore referred to as approved April 22, 1882." (Rec., p. 11.)

Plaintiff in error makes the following assignment of errors:

"The Louisville Water Company, plaintiff in error, comes and complains of the judgment rendered herein by the court of appeals of the Commonwealth of Kentucky. The said court had jurisdiction of the subject-matter of the litigation and is the highest court in said Commonwealth having such jurisdiction and its said judgment is final, and for cause of complaint said plaintiff in error, The Louisville Water Company, assigns errors as follows:

"First. The court of appeals errred in affirming the judgment of the Jefferson circuit court, law and equity division, heretofore known and styled the Louisville law and equity court.

"Second. The court of appeals erred in adjudging that the properties of the plaintiff in error were subject to taxation by the Commonwealth of Kentucky at any time between the 22d day of April, 1882, and the 15th of September, 1886, or that the properties of the plaintiff in error could be so subjected without violating the Constitution of the United States.

"Third. The court of appeals erred in failing and refusing to reverse the judgment of the Jefferson circuit court, law and equity division, heretofore known and styled the Louisville law and equity court, and in failing to adjudge that the properties of the defendant in error were exempt from liability to taxation by the Commonwealth of Kentucky prior

to the repeal on the 15th day of September, 1886, by an act entitled 'An act to amend the revenue laws of the Commonwealth of Kentucky,' approved May 17, 1886, of the provisions of an act approved April 22, 1882, entitled 'An act to amend the charter of the Louisville Water Company.'

"Fourth. The court of appeals erred in adjudging that the act of the General Assembly of the Commonwealth of Kentucky approved on April 22, 1882, entitled 'An act to amend the charter of the Louisville Water Company,' after being accepted by the plaintiff in error and its conditions performed by the plaintiff in error in the supplying of water for public purposes to the city of Louisville free of charge up to September 16, 1886, did not constitute a legal, valid, and enforcible obligation and contract between the Commonwealth of Kentucky and the plaintiff in error.

"Fifth. The court of appeals erred in adjudging that the said contract was not supported by a legal and valuable consideration upon the part of the plaintiff in error.

"Sixth. The court of appeals erred in adjudging that the authority exercised under, in the name, and for the benefit of the Commonwealth of Kentucky in the assessment of the property of the plaintiff in error for taxation and in attempting to enforce the collection of such taxes does not impair the obligation of the contract involved in the acceptance by the plaintiff in error of the provisions of the act approved April 22, 1882."

It will be seen that the different assignments of error really constitute but two causes of complaint. One is that the court of appeals of Kentucky erred in adjudging that the act of exemption, passed the 22d of April, 1882, did not constitute a valid contract between the Commonwealth and the plaintiff in error. The other is that the court erred in adjudging that the authority exercised under, in the name, and for the benefit of the Commonwealth of Kentucky in the assessment of the property of the plaintiff in error for taxation and in attempting to enforce the collection of such taxes does not impair the obligation of the contract.

It is right difficult to understand from the assignment of errors whether the plaintiff in error means to insist that the

law-making department of the Government had passed any law repealing or attempting to repeal the act of 1882 in so far as the particular tax is concerned. It is almost as difficult to determine this question from the brief as it is from the assignment of errors. We shall, however, discuss both phases of the question. Either the act of 1882 was or it was not repealed, so far as this tax is concerned, by the act of 1886. If it was not repealed in whole or in part, then no Federal question is presented. If it was repealed, then, as decided by this Court in the case of The Louisville Water Company *vs.* Commonwealth of Kentucky, 143 U. S., 1, there was power of repeal, and this question having been once deliberately adjudicated by this Court between the same parties is now conclusive as between them and the judgment should be affirmed.

We have heretofore argued a motion to dismiss the writ of error in this case upon the ground that no Federal question was presented. That motion was not acted upon, but the question was reserved for the final hearing. We shall, therefore, present our views upon this question first.

We shall then consider the question of repeal and then the question of the existence of the alleged contract.

ARGUMENT ON MOTION TO DISMISS.

By the allegations of the answer just quoted the defendant company has made an attempt to raise a Federal question on the record. As said by this Court in Hamblin *vs.* Western Land Company, 147 U. S., 532, "A real and not a fictitious Federal question is essential to the jurisdiction of this Court over the judgments of State courts." Let us then look carefully at the question attempted to be stated in this answer.

As to the allegation that the act of May 17, 1886, furnishes the only authority for the "*levy*" of the *tax* (as distinguished from the *assessment* of the *property*) the allegation is

not true, as the record and the acts above referred to plainly show. The act of May 17, 1886, does not attempt to make a levy of taxes for any time preceding the taking effect of the act. The levy of taxes for such antecedent time was provided for by other acts, the rate of taxation being fixed by them, and the act of May 17, 1886, simply provided that nothing therein contained should operate as a repeal of any obligations or penalties incurred under any existing law (article 12, section 7, Appendix 1); and although it was insisted in the court of appeals by plaintiff in error that this act had discharged all pre-existing obligations (if any there was) to pay this tax, levied as of January 10, 1886, yet the court in its opinion denied the truth of this proposition, simply calling attention, with reference to the act, to the fact that "it expressly excepted all obligations incurred under existing laws from repeal," and saying, "It is therefore clear that if appellant had become liable for the tax of 1886, the act *supra* did not release it from such liability" (Rec., p. 27); and while the court says it does not agree with appellant that the act is only prospective, yet it is plain that the court there refers to the matter of *assessing* property which had been omitted in the preceding years and not to the matter of levying a tax for preceding years; for the amount of tax for which judgment was given was, as heretofore stated, according to the rate in force for the year 1886, prior to the adoption of the act of May 17, 1886, viz., 51½ cents on the $100; whereas the rate fixed by the said act of 1886 was 47 cents upon the $100, and the rate in force in 1891, when the assessment was actually made, was 42 cents on the $100. We repeat, therefore, that the statement in the answer, to the effect that the act of May 17, 1886, furnishes the only authority for the *levy* of the tax asserted in the petition, is plainly not true; and no such authority was asserted or found, either by the Commonwealth, as plaintiff in the action, or by the court of appeals, in sustaining the tax.

Let us consider, then, the other allegation, to wit, that

this act of May 17, 1886, furnishes the only authority for the *assessment* of the property set up in the petition, and let us see what is the effect of this allegation, if true, in the matter of raising a Federal question. It is true that this act provided that the sheriff should report for assessment any property which had been omitted, and that the court construed this to apply to years preceding the adoption of the act as well as to succeeding years. This resulted simply from the fact that the act of May 17, 1886, was a general law, intended to cover the whole subject of revenue and taxation, intended to make a complete law for the State upon that subject, and unless the State was willing to release all obligations to pay taxes which had theretofore been levied upon property which had been omitted from the assessment-rolls by the officers whose duty it was to report the same it was necessary in adopting this new general law to make provision for assessing this previously omitted property. There had been a similar provision in the preceding general law, as it had existed since 1873 (long prior to the adoption of the exemption statute of 1882), for which the act of May 17, 1886, was intended as a substitute, this provision for the reporting of property by the sheriff being substantially a mere repetition of a similar provision in the preceding law.

This is conceded by plaintiff in error on page 5 of its brief.

But even if the act of 1886 in reference to assessing omitted property was not in substance the same as the preceding laws, still we insist that no Federal question is raised by the action of the sheriff in assessing the property of the Louisville Water Company or by the action of the court of appeals of Kentucky in upholding this proceeding on the part of the sheriff. We have already shown that the tax in question was not *levied* under the act of May 17, 1886, upon which plaintiff in error relies as impairing the obligation of the contract contained in the act of April 22, 1882. That tax had been *imposed* by pre-existing law. The act of May

17, 1886, did not purport to repeal the act of exemption of April 22, 1882, upon which plaintiff in error relies as a contract, so far as the time *preceding* May 17, 1886, was concerned. It did purport to repeal this exemption, with all other similar exemptions, for the time *succeeding* the passage of the latter act, and to the extent that it did purport to make this repeal this Court has upheld it as a valid exercise of legislative power (Louisville Water Company *vs.* Clark, 143 U. S., 1); but, as just stated, as to the period preceding the adoption of the act, it made no attempt to repeal the exemption, and therefore had no effect upon it one way or the other. It did not refer to it at all.

Clearly, therefore, it cannot be said that the act of May 17, 1886, impaired the obligation of the alleged contract contained in the act of April 22, 1882. It is impossible to understand how it can be said that a legislative act has impaired the obligation of a contract contained in a preceding statute when it makes no reference to the same, either expressly or by implication, either in general or specific terms.

But, as heretofore explained, the act of May 17, 1886, was a general revenue statute, and, among other things, it provided generally for the assessment by the sheriff of any property liable to taxation for preceding years, but which had been improperly omitted from the assessment books. It made no attempt whatever to alter the pre-existing laws which had provided what property should be liable to taxation. It did not purport to affect that question in any manner, and it did not in fact do so. It only provided in general terms for the assessment by a proper officer of property which had been liable and was liable to taxation under the pre-existing laws, but which had been improperly omitted. This was all that was done by the legislative department of the State.

But the sheriff, a ministerial officer, conceived that the property of the Louisville Water Company was liable for taxation under the laws as they existed prior to May 17,

1886. He conceived that the act of April 22, 1882, purporting to exempt the property of the Louisville Water Company from taxation, was unconstitutional, and therefore that that property was and always had been subject to taxation by the State, and that as it had not been assessed and as no taxes had been paid upon it since April 22, 1882, it ought to be reported and assessed for taxation, and accordingly he did assess the same, and a suit was brought in the name of the Commonwealth and of the sheriff jointly against the water company to recover the amount of the tax based on this assessment for the year 1886, and the lower court having given judgment in favor of the plaintiffs for the amount of the tax the court of appeals affirmed that judgment.

If any wrong has been done the Louisville Water Company in disregard of its alleged contract contained in the act of April 22, 1882, so far as the tax involved is concerned, it has been done by the sheriff, the ministerial officer, and by the judges of the courts, being the judicial officers of the State. *There has been absolutely no attempt on the part of the legislative department of the State to interfere with this alleged contract.* Such being the case, no Federal question is presented.

It cannot be said that the validity of the statute of May 17, 1886, is in any sense drawn in question. As to the right of the legislature of a State to direct that property liable to taxation under pre-existing laws, but which had been omitted from the assessment books by accident or otherwise, should be assessed so that the taxes might be collected upon the same, this cannot be doubted, and to deny this right and in that way attempt to raise a Federal question is to do exactly what this Court, in the case already cited, said could not be done. "The bare averment of a Federal question is not in all cases sufficient. It must not be wholly without foundation." (Hamblin *vs.* Western Land Company, 147 U. S., 532.)

It may be said, however, that the action of the sheriff in assessing this property for taxation upon the idea that the exempting statute was unconstitutional, supported and maintained by the decision of the court of appeals, was "an authority exercised under the State," and that this has been drawn in question on the ground of being repugnant to the Constitution of the United States, and that, as the decision of the State court was in favor of the validity of such authority, therefore a Federal question is presented.

But this manifestly cannot be true. Of course, every ministerial officer acts only by virtue of an authority under the State, and so every judicial officer acts only by virtue of an authority under the State, and this authority is always conferred by legislative action either in the form of a constitution or statute, and this may be a new constitution or a new revision of the laws adopted after the passage of some act which is claimed to constitute a contract. Thus the court of appeals which gave judgment for this tax was a court created by a constitution adopted in 1891, long after the passage of the exemption statute of 1882, and it may be said that the only authority for the existence of the court or of the sheriff who made the assessment was the constitution of 1891, though it did not affect the question of defendant's liability or exemption from liability to taxation. Yet it is perfectly evident, and this Court has often so held, that the fact that a party complains of the action of a ministerial officer or of a court as being in violation of a contract right does not raise a Federal question. The mere action of a ministerial officer or a judicial officer *under a statute which is itself valid* will not be sufficient to raise such a question.

In New Orleans Water Works *vs.* Louisiana Sugar Company, 125 U. S., 30, this Court said:

"In order to come within the provisions of the Constitution of the United States, which declares that no State shall pass any law impairing the obligation of contracts, not only must the obligation of a contract have been impaired, but

it must have been impaired by a law of the State. The prohibition is aimed at the legislative power of the State and not at the decisions of its courts or the acts of administrative or executive boards or officers or the doings of corporations or individuals."

The Court conceded in the case just cited that legislative authority might be exerted otherwise than by the immediate action of the legislature of the State; thus, that the legislature might authorize a municipal council to exercise certain legislative functions, as, for example, in the levying of municipal taxes, and that where this should be the case the action of the council in making such a levy would be regarded as the enactment of a law by the State. It also recognized the fact that the enactment of what purported to be laws by the Confederate government, and which were given the effect of laws in the several States of the Confederacy, were enactments of laws within the meaning of the Federal Constitution; but while the case then immediately before the Court was one in which a municipal ordinance of the city of New Orleans was attacked as being in contravention of an alleged contract right, yet the Court said that the action of the city council in the matter complained of was *not legislative in its character*, but was entirely ministerial, and therefore no Federal question was thereby presented. In that case a legislative act of the State of Louisiana had granted to the New Orleans water works the exclusive right to furnish water to the city of New Orleans, providing, however, that nothing therein should "be so construed as to prevent the city council from granting to any person or persons contiguous to the river the privilege of laying pipes to the river exclusively for his or their own use." Subsequently the city council, by the ordinance complained of, did grant to the Louisiana Sugar Company the right to lay pipes to the river for its own use, it being contended that the property of this company was "contiguous to the river." It was insisted by the water company that this property was not contiguous to

the river, and that therefore this ordinance was in violation of the contract between the water company and the State as contained in the legislative act referred to; but this Court held that the city council, although exercising authority under the State (for all municipal councils do this), and although acting by virtue of the authority granted to it by the legislative act which had created the contract, yet did nothing more than determine for itself that this property of the sugar company did lie contiguous to the river, and that, as this was *a purely ministerial action and in no sense legislative in its character*, therefore, although the action was taken by a body which in many respects had legislative powers, yet the action complained of was not a legislative action, and raised no Federal question.

So in the case at bar. So far as the legislative act of May 17, 1886, is concerned, it certainly attempted to do nothing except what the legislature had power to do, viz., to direct its officers to assess any property which had been liable to taxation under pre-existing laws, but which had been improperly omitted from the assessment books, and the action of the sheriff in determining for himself that the property of the Louisville Water Company was liable to taxation under the law as it existed prior to May 17, 1886, and the action of the courts in upholding this action on the part of the sheriff were, of course, not legislative acts in any sense of the word, and therefore do not present any Federal question.

We suppose the principle to which we have referred, to wit, the necessity for *legislative* action by the State in order to raise a Federal question based on contract rights, is so thoroughly understood as not to need an extensive citation of authorities. We may, however, refer to a very late case on the same subject in Central Land Company *vs.* Laidley, 159 U. S., 109, where this Court said:

"In order to come within the provision of the Constitution of the United States, which declares that no State shall

pass any law impairing the obligations of contracts, not only must the obligation of a contract have been impaired, but it must have been impaired by some act of the legislative power of the State and not by a decision of its judicial department only."

We submit that the motion to dismiss the writ should be sustained.

REPEAL.

We do not believe there is any merit in the claim that the act of 1886 repealed the act of 1882, exempting the water company from taxation, so far as the tax in controversy is concerned: but if that be assumed, which must be done before this Court can take jurisdiction, we maintain that there was power to repeal. This very question was decided by this Court in the case of The Water Company *vs.* Kentucky, 143 U. S., 1, the general act of 1856, reserving the power of amendment or repeal, being read by this Court into the act of exemption. The power of repeal being thus reserved, it being a part of the act of exemption that it might be at any time withdrawn, the company at all times held the exemption subject to the reserved right of the State; but it is claimed that the State had no right to do so unjust a thing as to make the repeal operate retroactively, because it is said water had been furnished to the city free of charge for about four months and a half of 1886 when the revenue act of 1886, claimed to operate as a repeal, was passed. Whether the repeal operates justly or unjustly, we submit, is not a question for this Court. If the *power* of repeal exists, this Court will hold that the Constitution of the United States affords no protection and will leave the question of whether act of repeal operates prospectively only or both prospectively and retrospectively to the State court.

But no injustice has been done:

1. Because if the furnishing of water free of charge to the city was the consideration for the repeal, then when the con-

sideration was withdrawn the water company had a perfectly good claim against the city for the water furnished for the year 1886.

II. But as the city owned all the stock of the water company (Rec., p. 7) it is, of course, folly to say that the furnishing of water to the city free of charge could have been the consideration for the exemption, because, of course, no one can be made a penny richer or poorer by paying to himself out of his own funds, whether the payment be a dollar or a million dollars; and this is the view expressed by the court of appeals.

III.

THE ACT OF EXEMPTION WAS NOT A CONTRACT.

But if the Court should disagree with us on the questions heretofore discussed, then we propose to show the Court, as we feel confident we can do, that the act of 1882 *was not a contract*, either in form or in substance.

We propose now, under the present heading of our argument, to consider the proposition of whether the act of 1882 was in form or substance a contract.

Two constructions of the terms of this act, as showing the meaning of the legislature and the inducement which moved it to grant the exemption, have been contended for.

Counsel for the water company contend that it is simply a contract between the State and the Louisville Water Company as a private corporation, whereby the State, recognizing its duty to furnish water for fire protection to the city free of charge, agreed with the water company that if it would furnish this to the city free of charge the State would release it from the payment of taxes.

We, as counsel for the sheriff, contend that the act is simply an attempt on the part of the legislature to exempt the property *because it belonged to the city of Louisville.*

The question, which of these two constructions is correct, is, of course, very important. If the first be correct, then the act is at least in the form of a contract, and the serious questions will become those as to its validity and the questions heretofore discussed; but if the second construction, or, in other words, our construction, be correct, then manifestly there is no contract, and this Court has no jurisdiction to determine the question of the right of the State to grant an exemption to the property simply because it belongs to a municipality.

We do not see how there can be any doubt as to the view which the legislature took of the situation, nor as to what the terms of the act itself show to have been the reason which influenced the grant of exemption. For the convenience of the Court we will repeat the terms of the act. It is as follows:

1. "That it shall be the duty of the Louisville Water Company to furnish water to the public fire cisterns and public fire plugs or hydrants of the city of Louisville for fire protection free of charge."

2. "The sinking fund of the city of Louisville being the owner of the stock of the Louisville Water Company, and said water company by virtue thereof is the property of the city of Louisville, *therefore* the Louisville Water Company is hereby exempted from the payment of taxes of all kinds, of whatever character, State, municipal, and special." (Our italics.)

Thus, in the second section of the act wherein the exemption is granted, the legislature in express terms declares that the reason of the exemption is the fact that the property belonged to the city of Louisville. Counsel contend that because the first section directs the water company to furnish water for fire protection to the city of Louisville free of charge, therefore that must have been the consideration. They contend in effect that we must simply put together the two facts of furnishing water for fire protection, as re-

quired by the first section of the act, and the exemption from taxation, as granted by the second section, and must treat the one as the consideration of the other, and as thus showing an intent to form a contract with mutual obligations between the State and the water company, regardless of the reasons which the State has expressly given for its action, and which clearly show that it did not consider that it was forming a contract with the water company as a private corporation, but that it exempted it simply because it was understood to belong to the city of Louisville.

The direction to the water company to furnish water to the city for fire protection free of charge, as required by the first section, so far from supporting the idea of a contract, confirms the other view of the act. The language of the act is not the language of a contract, nor of a proposition for a contract, but is language which shows that the State regarded the property of the water company merely as the property of the city of Louisville, and regarded the payment by the city to the water company as a mere payment by the city to itself for the use of its own property, though it was a payment out of the general fund into the sinking fund of the city, and therefore directed that this transfer of funds from one department to the other should cease, inasmuch as by the same act the funds of the sinking fund were greatly increased by an exemption of three or four million dollars' worth of its property from taxation (the legislature supposing, of course, that the act of exemption was valid), the idea being to preserve to some extent the equilibrium between the two funds.

It seems, therefore, very clear, not only from the second section of the act, but also from the first and second sections taken together, that the legislature of the State in passing this act had no idea of making a contract with the water company, but that it regarded the water company as itself the property of the city of Louisville, and considered that it

was on that account alone a proper subject of exemption from taxation.

The fact that this was at least the view taken of the matter by the legislature is further supported by the fact that in granting the present charter of the city the water company was spoken of, as heretofore shown herein, as "an institution of the city;" and although this part of the charter was subsequently repealed and provision made that the city should pay the water company for water supplied by the latter, this was evidently for the purpose of maintaining the assets of the sinking fund of the city, the amendment being passed, not for the benefit of the water company, but solely for the purpose of preventing a decrease in the assets of the sinking fund, which it was considered proper to keep up.

Now, although we will presently show that this *could not* have been a contract under the facts that actually existed when it was passed, yet before reaching that point, have we not shown that it *was not* a contract when we have shown, as we have just attempted to do, that the legislature *did not so intend?*

In New Jersey *vs.* Yard, 95 U. S., 114, this Court, through Justice Miller, in speaking of legislative acts that were claimed to be contracts, said:

"The difficulty in this class of cases has always been to distinguish what is intended by the legislature to be an exercise of its ordinary legislative function in making laws, which, like other laws, are subject to its full control by future amendments and repeals, from what is intended to become a contract between the State and other parties when the terms of the statute have been accepted and acted upon by those parties. This has always been a very nice point; and when the supposed contract exists only in the form of a general statute doubts still recur after all our decisions on that class of questions."

Now, when the legislature shows clearly by its language that it is simply attempting to exercise a supposed power of exemption from taxation on the ground that the property exempted belongs to a city, and, further, in the language of command, directs that certain services shall be performed for this city by a corporation which it states to be the property of the city, can this corporation obey the command and then insist that it is a mere private corporation, and that it has treated this act as a proposition for a contract and has accepted it? We think it clear that this cannot be done; and as the act on its face showed clearly that it was intended as a command, in the exercise of a supposed right of command, and not as a contract or agreement, the water company had and has no right to treat it otherwise.

Furthermore, the ground on which it is held that the consideration for the grant of an exclusive privilege by the legislature will be held *adequate* by the courts, if it is *valid*, is that the *legislative judgment* having acted on a matter within the legislative province, this judgment will be held *conclusive* on the question of the adequacy of the consideration (Gordon *vs.* Winchester Building Association, 12 Bush., 114, cited with approval in Louisville Gas Company *vs.* Citizens' Gas Company, 115 U. S., 694). Therefore, when it affirmatively appears on the face of an act that the legislature has granted an exemption from taxation *on one particular specified ground*, and on no other, we do not see how any other can be treated as having been considered or as having been adjudged sufficient by the legislative judgment or as having formed the basis of any agreement between the State and a third party. When no consideration for the exemption is expressed, the courts will uphold it if *any* valid consideration can be found; but where the consideration is expressly stated, that, and that only, can be considered as having received the sanction of the legislative judgment.

But not only is the construction for which we have contended the only one which can be given to the terms of the

act, it is, moreover, the only view that could have been taken of the situation as it actually existed when this act was passed. It is impossible that a contract such as that contended for by counsel for the water company could have been made. Counsel contend that the State considered it to be its duty as a State to furnish water for fire protection to the city of Louisville free of charge, and that in order to perform this obligation to the city the State contracted with the Louisville Water Company, as a private corporation, to perform this service, and agreed in consideration therefor to exempt it from taxation.

The foundation of this argument is the State's *obligation to the city* and its desire to satisfy that obligation by doing something which would be of benefit to the city. But if the city owned the water company, then a payment to the water company by the city was but a payment to itself—a payment from one of its funds into another of its funds—and to be relieved from this was of no benefit to the city and could not be any discharge of the State's obligation to the city.

But it is said that this water company is owned by the sinking fund of the city of Louisville; that this is a separate corporation, the funds of which are charged with the payment of certain specified creditors of the city, and that it makes a great difference if the city ceases to pay the water company for water, for thus the funds of the sinking fund are reduced. But to whom does this make a difference? The difference is solely to the creditors of the city. The creditors whose debts are charged on the sinking fund may suffer (unless some compensation be otherwise made), while the general creditors may gain; but the city, which is liable to all of its creditors, neither gains nor loses one cent of its estate by a transfer of money from one of its funds to another of its funds.

But as the alleged obligation of the State which it is said now to be seeking to fulfill is an obligation *to the city*, it

must, in order to fulfill this obligation, do something which is of benefit to the city; and as relieving the city from the necessity of paying out one of its funds into another of its funds could not be of any benefit to the city, therefore this could not have been of any consideration for the State's action. Under such circumstances the only thing the State could do to benefit the city, and thus fulfill the State's obligation to the city, would be to relieve the city's property from taxation. And this release of its property from taxation was the sole benefit received by the city from the State; while the stopping of payments from the general fund to the sinking fund was of no benefit to the city, but was merely an evening up of the two funds, making some compensation to the general fund out of the sinking fund for the new increase in the assets of the sinking fund derived from the exemption of this property from taxation.

We say, therefore, that it conclusively appears from the terms of the act of the legislature that it attempted to exempt this property because it was the property of the city of Louisville, and not on the idea that it was exempting the property of a private corporation in consideration of its performing a duty which the State owed to the city, and that this is consistent with the view which the legislature had taken of this matter and upon which it had acted for nearly half a century before the act of 1882 was passed. And we say further that it conclusively appears from a consideration of the facts of the case that that which the State by the first section of the act of 1882 ordered to be done, to wit, that water should be furnished by the Louisville Water Company to the city of Louisville for fire protection free of charge, was no benefit or gain whatever to the city, and therefore could not have been considered by the State as any performance of its obligation to the city, and consequently could not have been any consideration for the State's granting an exemption from taxation to the Louisville Water Company.

And we call attention to the fact that this is the view

which has been taken of this act by the court of appeals of Kentucky (in the case of Clark *vs.* Water Company, 90 Ky., 515), a tribunal which is, of course, familiar with all of the parties to this transaction and fully understands the relation which they bear to each other. Even Judge Pryor, the dissenting judge, says in his dissenting opinion that he has no doubt that the ownership of the stock of the Louisville Water Company by the city of Louisville was the inducement to the exemption, and again says that he considers the tax-payers of Louisville as the real parties to this controversy. In other words, he bases his dissent on what he conceives to be an injustice to the tax-payers of Louisville, and not upon any idea of a violation of the contract rights of the Louisville Water Company. In dealing with this question the court in its opinion used this language:

"We think it evident that the furnishing of water by the company to the city for fire protection free of charge was not what induced the passage of the act. Its recitals, aside from the express statement in it of the reason, make this quite plain. It says: 'The sinking fund of the city of Louisville being *the owner of the stock of the Louisville Water Company, and said water company, by virtue thereof, is the property of the city of Louisville; therefore* the Louisville Water Company is hereby exempted from the payment of taxes of all kinds of whatever character, State, municipal, and special.'

"According to the legislative recital, the sinking fund of the city owns the entire stock of the water company. There is nothing in the record showing otherwise, and it must therefore be assumed to be true." (In the answer in the present action this is expressly averred to be true.) "While the sinking-fund department is a separate corporation from that of the city proper, yet it is merely the money-making branch of the municipal government. It has charge of its funds and its investments, whether in bank, railroad, water company stocks, or other valuable and money-making securities.

"We see, therefore, that the property and rights of the water company belong to the city. While, therefore, the

act recites that it shall be the duty of the water company to furnish water to the public fire cisterns and public fire plugs or hydrants of the city for fire protection, yet this could not have been the consideration that induced the passage of the act, since it made no difference to the city whether a million of dollars or a penny might be paid for this service, because it was the owner of the rights and property of the water company, and it would, therefore, be but a payment to *itself*. It cannot be supposed, therefore, that the legislature intended to relinquish over $10,000 of taxes annually in consideration that the city would not charge *itself* for water furnished by *itself*.

"It is useless to inquire why the act declares that the water company should furnish water to the city free of charge. Perhaps, as suggested by counsel, it was merely to avoid the trouble of keeping an account between the sinking-fund department and the city proper. The reason which induced the attempted granting of the exemption must, therefore, have been, as indeed the act recites, that the sinking fund of the city, or, in other words, the city itself, owned all of the water-company stock." (Court's italics.)

The act of exemption being a mere gratuity and not a contract, the Constitution of the United States affords no protection against the repeal of the act.

CONCLUSION.

We maintain:

I. That this Court has no jurisdiction because no law has been passed impairing the obligation of the alleged contract or purporting to in anywise affect the act of exemption, the real ground of complaint being that the State court held the act of exemption to be in conflict with the State constitution.

II. If the subsequent law be held to repeal the act of exemption so far as the tax in controversy is concerned, then there was a power of repeal.

III. That the act of exemption does not constitute a contract, and therefore a Federal question is not presented.

We therefore respectfully submit that the writ of error should be dismissed or the judgment should be affirmed.

JAMES P. HELM,
HELM BRUCE,
Counsel for Defendant in Error.

AUTHORITIES CITED.

Clark *vs.* Louisville Water Co., 90 Ky., 515.
Louisville Water Co. *vs.* Kentucky, 143 U. S., 1.
Hamblin *vs.* Western Land Co., 147 U. S., 532.
New Orleans Water Works *vs.* La. Sugar Co., 125 U. S., 30.
Central Land Co. *vs.* Laidley, 159 U. S., 109.
New Jersey *vs.* Yard, 95 U. S., 114.
Gordon *vs.* Winchester, &c., 12 Bush, 114.
Louisville Gas Co. *vs.* Citizens' Gas Co., 115 U. S., 694.

APPENDIX.

I.

HEWITT ACT OF MAY 17, 1886 (1 ACTS 1885–'86, PAGE 140).

Article 1, section 1. "That an annual tax of forty-seven cents upon each one hundred dollars of value of all real and personal estate directed to be assessed for taxation, due and payable the fiscal year assessed, shall be paid by the owner or person assessed."

Art. 12, sec. 7. "That this act shall take effect from and after September 14, 1886; but it shall not operate as a repeal of existing laws as to any assessment made, licenses granted, or obligations or penalties incurred under any existing law."

II.

ACT OF MAY 22, 1890 (1 ACTS 1889–'90, PAGE 158).

SECTION 1. "That section one of article one of an act entitled 'An act to amend the revenue laws of the Commonwealth of Kentucky,' approved May seventeenth, one thousand eight hundred and eighty-six, be, and the same is hereby, amended so as to substitute for the word 'forty-seven,' in the first line, the word 'forty-two,' and for the word 'twenty,' in the seventh line, the word 'fifteen.'

SEC. 2. "This act shall take effect from and after its passage."

"Became a law, the objections of the governor to the contrary notwithstanding, May 22, 1890."

LOUISVILLE WATER COMPANY *v.* KENTUCKY.

ERROR TO THE COURT OF APPEALS OF THE STATE OF KENTUCKY.

No. 179. Argued January 11, 1898. — Decided April 11, 1898.

On the authority of *Louisville Water Company* v. *Clark*, 143 U. S. 1, which is affirmed, it is held that the exemption from taxation acquired by the Louisville Water Company under the act of Kentucky of April 22, 1882, c. 1349, was not withdrawn except from the day on which the act of May 17, 1886, known as the Hewitt Act, took effect; and the company cannot be held for taxes which were assessed and became due prior to September 14, 1886, when that act took effect.

THE case is stated in the opinion.

Mr. T. L. Burnett for plaintiff in error.

Mr. James P. Helm for defendant in error. *Mr. Helm Bruce* was with him on the brief.

MR. JUSTICE HARLAN delivered the opinion of the court.

This action was brought by the Commonwealth of Kentucky to enforce a lien in its favor upon certain real and personal property of the Louisville Water Company, a Kentucky corporation; which lien, it was alleged, was for taxes amounting to $12,875 for the year 1886. The property upon which the State claimed this lien included the pipes, mains, buildings, reservoirs, engines, pumping stations, etc., belonging to the Water Company.

The company denied its liability to state taxation for the year 1886 or for any year subsequent to the 22d day of April,

1882, the date of the passage of an act to which we will presently refer.

In the court of original jurisdiction a judgment was rendered for the Commonwealth, and that judgment was affirmed in the Court of Appeals of Kentucky.

The history of the legislation in Kentucky in reference to this company appears in *Louisville Water Company* v. *Clark*, 143 U. S. 1, a suit involving the question of the liability of the company for state and county taxes for the year 1887.

The Water Company was incorporated in 1854 without any exemption of its property from taxation. But, as stated in that case, it was made its duty to furnish water to the city for the extinguishment of fires and the cleansing of streets, upon such terms "as might be agreed between itself and the municipal authorities;" and, the latter assenting, "the Water Company was to have the exclusive right to furnish water to the inhabitants of Louisville, by means of pipes and aqueducts, upon such terms and for such time as might be stipulated between it and the city." Act of March 6, 1854, c. 507, Sess. Acts, 1853–4, vol. 2, p. 121.

By an act approved February 14, 1856, it was provided that "all charters and grants of, or to corporations, or amendments thereof, and all other statutes, shall be subject to amendment or repeal at the will of the legislature, unless a contrary intent be therein plainly expressed: *Provided*, That whilst privileges and franchises so granted may be changed or repealed, no amendment or repeal shall impair other rights previously vested." 2 Rev. Stats. Kentucky, 1860, 121.

Subsequently, by an act approved April 22, 1882, which took effect from its passage, it was made "the duty of the Louisville Water Company to furnish water to the public fire cisterns and public fire plugs or hydrants of the city of Louisville for fire protection, *free of charge*." But the same act provided: "The sinking fund of the city of Louisville being the owner of the stock of the Louisville Water Company, and said Water Company by virtue thereof is the property of the city of Louisville, therefore the Louisville Water Company is hereby exempt from the payment of taxes of all kinds, of

whatever character, state, municipal or special." Sess. Acts, 1882, vol. 2, p. 915, c. 1349.

On the 17th of May, 1886, the general assembly of Kentucky passed a general revenue statute — commonly known as the Hewitt statute — which did not take effect until September 14, 1886, after taxes were assessed for 1886. It was conceded in the case of *Louisville Water Company* v. *Clark*, above cited, that the property of the Water Company was subject to taxation under that statute, unless it was exempted from taxation by the above act of April 22, 1882.

The contention of the Water Company was that the exemption from taxation given by the act of 1882 could not be withdrawn by subsequent legislation without violating the contract clause of the Constitution of the United States. This contention made it necessary to inquire whether that exemption was in fact withdrawn, and if so, whether the statute withdrawing it impaired the obligation of any contract the company had with the State by the act of 1882.

This court held that the exemption allowed by the act of 1882 was withdrawn by the revenue statute of 1886; and that, as the Water Company's exemption was acquired in 1882 subject to the power of amendment or repeal reserved by the above act of 1856 — which saved, whenever that power was exerted, all rights previously vested — the State could, as it did by the revenue statute of 1886, withdraw the exemption given in 1882.

But the question remained whether the withdrawal of the exemption could take effect while the company was under an obligation imposed upon it by the act of 1882, to furnish water to the public fire cisterns and public fire plugs or hydrants of the city of Louisville for fire protection, "free of charge." The court was of opinion that the contention of the Water Company, that the general statute of 1886 impaired the obligation of its alleged contract, could not be fully disposed of without determining the question just stated. It therefore said:

"It is, however, contended that the exemption from taxation could not be withdrawn while the Water Company

remained under the obligation imposed by the first section of the act of 1882 to furnish water to the city for fire protection, free of charge. But no such obligation remained after the passage of the act of 1886, which, as we have seen, had the effect to withdraw the immunity from taxation granted by the second section of the act of 1882. In determining the object and scope of the act of 1882, we must look at all of its provisions. The Water Company was under a duty by its charter, passed before the act of 1856, to furnish water for the extinguishment of fires and the cleansing of streets, not free of charge, but upon such terms as might be agreed upon by it and the city. And the legislature certainly did not assume to impose upon it the obligation to furnish water, for fire protection free of charge, except in connection with the grant to it of immunity from taxation. Accepting, however, the benefits of this exemption from taxation, it became bound to supply water for public purposes, free of charge. But that obligation remained only so long as the exemption continued in force. The act of 1882 is to be regarded as an entirety, and meant nothing more than that the company should furnish water for fire protection, free of charge, so long as the immunity from taxation continued. This view is in harmony with the act of 1856, which expressly declares that whilst privileges and franchises granted to corporations, after its passage, could be changed or repealed, no amendment or repeal should impair other rights previously vested. The effect of the withdrawal of the immunity from taxation was, therefore, to leave the Water Company in the position it was in before the passage of the act of 1882 in respect to its right to charge for water furnished for public fire cisterns, fire plugs or hydrants." 143 U. S. 15.

It was thus adjudged that the statute of 1886 did not affect the company's exemption from taxation so long as the act of 1882 was in operation; in other words, the exemption, by force of the act of 1882, continued until the statute of 1886 took effect, but no longer. Under this view, the company was held liable to pay taxes assessed for 1887, although not liable for taxes accruing before the statute of 1886 took effect.

But it is contended that this court should accept the views expressed by the Court of Appeals of Kentucky in the former case as to the scope and effect of the act of 1882. *Clark* v. *Louisville Water Co.*, 90 Kentucky, 515, 519, 523. In that case two questions were raised in the state court: first, that if it were true that the legislature was moved to the passage of the act of 1882 upon the idea of the rendition of a public service, the company rendered no such public service as the constitution of Kentucky contemplated, when it declared, in its Bill of Rights, that "no man or set of men are entitled to exclusive, separate public emoluments or privileges from the community, but in consideration of public services;" second, that this was not the reason for the passage of that act, and that the exemption from taxation was unsupported by any valid consideration, or such as the constitution recognized. The court waived any consideration of the first question — stating that there was a difference of opinion upon it — and held that the sole consideration which moved the legislature to pass the act of 1882 was the fact that the city of Louisville owned the stock of the Water Company. Touching that question the Court of Appeals of Kentucky said in the former case: "The fact that the furnishing of the water may incidentally protect from fire the public buildings of the State will not support the exemption. The privilege was not conferred, as the legislature declared, and, as we have otherwise shown, for governmental purposes, but merely for a reason which will not support it. It arose out of considerations relating to the private and pecuniary advantage of the city, and in which the State at large had no interest." Again: "If it be said that the exemption should be upheld if it be, in fact, supported by any valid consideration, although the recited one be invalid, we reply that the real consideration, and the one which moved the parties to the transaction, is to be regarded. The one acted upon by the legislature, and expressed in the act, and which must have been understood by the city, was the simple fact that it owned the stock in the Water Company. This was not a valid consideration, and we have already seen that mere incidental protection of the public buildings does

not aid the matter. The so-called contract was, therefore, void at its inception. Instead of being impaired in any way forbidden by law, it never had any existence; and it seems to us well that we feel at liberty to so declare, because we have a general law taxing water companies, and if one company be exempt, that of any other city has an equal right to ask the privilege. A statute exempting one is certainly open to the objection of impolicy, if, indeed, it be not such unequal and partial legislation as is forbidden by law."

The grounds upon which the state court overruled the contention of the Water Company in the former case were not overlooked. And it was, in effect, there adjudged, as the above extract from the opinion of this court shows, that the exemption given by the act of 1882 was, partly at least, in consideration of the agreement of the company to furnish water to the public fire cisterns, plugs and hydrants "free of charge," and not as provided in the company's charter, upon such terms as might be agreed upon between it and the city; that this obligation of the company continued while its exemption from taxation continued; and, consequently, that such exemption, being a vested right under the act of 1882, to be withdrawn only by statute having a prospective operation, could not be withdrawn except as to taxes accruing after the statute of 1886 took effect.

It is to be observed that the Court of Appeals in its opinion in the present case states that the authority for reporting to the county court clerk the tax list for 1886 of property omitted to be listed with the auditor, was to be found in the Hewitt bill which was passed, as we have seen, after the enactment of the act of 1882.

The argument in behalf of the Commonwealth in the present case, in effect, calls for a reconsideration of what was said in the former case. We do not regard such reconsideration as necessary; and upon the authority of the decision in the former case, we adjudge that the exemption from taxation acquired by the Water Company under the act of 1882 was not withdrawn except from the day on which the statute of 1886 took effect. It results that the company cannot be held

for taxes which were assessed and became due prior to September 14, 1886, when the Hewitt act took effect. The petition of the Commonwealth of Kentucky should have been dismissed.

The judgment is reversed, and the cause is remanded for further proceedings not inconsistent with this opinion.

MR. JUSTICE GRAY dissented.